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**ANALYSIS OF THE INFLUENCE
OF FEDERAL AIR, WATER,
AND NOISE LEGISLATION
UPON NAVAL OPERATIONS**

John W. Wilmer, Jr., U.S.N.

Research Contribution 207

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Research Contribution 207**

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12 June 1972

John W. Wilmer, Jr., U.S.N.

**This Research Contribution does not necessarily represent
the opinion of the Department of the Navy.**

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ABSTRACT

This Research Contribution examines the influence upon Naval operations of the National Environmental Policy Act of 1969 (NEPA) and of existing and pending federal air, water, and noise legislation, in light of subsequent implementation by the executive branch and interpretation by the judicial branch. In so doing this paper suggests procedures which will better insure that the letter and the spirit of such legislation are manifested throughout the Navy in decisions concerning environmental matters.

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FOREWORD

The atmosphere and the waters of the United States have a waste assimilative capacity which has been exceeded with increasing frequency. Similarly, the human body has a limited tolerance for objectionable noise. This too has been exceeded with increasing frequency. A growing awareness of these problems of air, water, and noise pollution has resulted in stringent federal legislation which, in recent months, has had an increasing impact upon Naval operations.

- June 1971: San Francisco issued a cease and desist order prohibiting the discharge of waste into San Francisco Bay from the Hunters Point shipyard.
- November 1971: New Jersey stated that unless the Lakehurst Naval Station immediately complied with New Jersey's federally-approved water quality standard, the Navy would be sued.
- December 1971: (a) it became apparent that the Environmental Protection Agency (EPA) will probably impose a no-discharge policy upon sewage from Navy (and other) vessels in U.S. waters.
- (b) EPA promulgated emission standards for large incinerators and fossil-fuel steam-generators. Provision is made for citizens to bring suit against the Navy if it constructs or substantially modifies incinerators or steam generators which fail to meet these standards.
- January 1972: (a) citizens took the Navy and Marines to court, seeking to enjoin them from conducting Operation Snowy Beach in Reid State Park, Maine on grounds that an impact statement considering the environmental effects of the operation had not been filed.
- (b) a suit was filed by "People of the State of California" to require the Long Beach Naval Station to comply with California air pollution emission standards.
- March 1972: (a) the San Diego Regional Water Quality Board issued a cease and desist order which, if enforced by the court, will bar the Navy from San Diego Bay until it eliminates raw sewage and oil discharge from Navy ships in the Bay.
- (b) an air pollution suit was filed against the Naval Weapons Center, Concord, California.

These recent actions taken against the Navy suggest the influence that environmental law can have upon Naval operations. These actions are based upon three pieces of federal environmental legislation: the National Environmental Policy Act of 1969, the Clean Air Act of 1970, and the Federal Water Pollution Control Act of 1970. This paper, which includes developments in environmental law through 12 Jun. 1972, will analyze the influence upon Naval operations of these and other pieces of present and pending federal legislation concerning air, water, and noise pollution.

SUMMARY

The following paragraphs summarize the influence upon Naval operations of existing and pending federal air, water, and noise legislation.

GENERAL

The *National Environmental Policy Act of 1969* (NEPA) requires the Navy (and any other federal agency) to file a detailed environmental impact statement for any "major action" which "significantly affects" the quality of the human environment. Any person with standing to sue (usually one whose person or property has suffered aesthetic, recreational, or financial injury) may sue the Navy if it fails to comply with this Act. Remedies for such suits include court injunction against the existing or proposed action in question until an adequate environmental impact statement is prepared and until adverse effects upon the environment from the existing or proposed action are minimized. NEPA was the basis of the Operation Snowy Beach suit, in which an injunction was sought by concerned citizens. It appears that a court will not issue an injunction against a Navy action which fails to comply with NEPA where such action is inextricably intertwined with national security, but may issue an injunction where such action is only marginally related to national security.

AIR

The *Clean Air Act of 1970* probably requires the Navy, with limited exceptions, to comply with national source emission standards promulgated by the Administrator of EPA (hereafter referred to as the Administrator). At this writing, emission standards have been set under Sec. 111 for 5 new stationary sources of air pollution: incinerators, fossil-fuel steam-generators, portland-cement plants, contact-sulfuric-acid plants, and nitric-acid plants. Any construction or substantial modification of these sources after 17 Aug. 1971 must meet these standards. The incinerator and steam-generator standards will probably have an impact on construction within large Naval bases, particularly because these standards are applicable to the Navy without exception. Standards will soon be set for aircraft under Sec. 231 (these mobile source standards could apply to military aircraft; however, a Presidential exemption is available) and under Sec. 112 for sources emitting asbestos, mercury, and beryllium (these are hazardous air pollutants for which limited exceptions are available). Other stationary source, mobile source, and hazardous air pollutant standards are certain to be set in the near future.

The Act probably requires the Navy to comply with federally-approved state plans for achieving national ambient-air-quality standards promulgated by the Administrator. These ambient (open-air) standards set the maximum concentration of certain pollutants which is permitted in any state's air at any time. At this writing, ambient standards have been set for carbon monoxide, sulfur oxides, particulate matter, hydrocarbons, photochemical oxidants, and nitrogen oxides. Many state plans require permit applications and source emission-limitations as a means of meeting the national ambient standards and will affect those Naval facilities which contribute to air pollution.

These national source-emission and state-implemented ambient air-quality standards are accompanied by strong enforcement procedures, the most important of which is that any person may sue the Navy for violating any standard. This possibility is known as a "citizen suit" provision. In

addition, the Act does not exclude military bases from a provision providing (1) for right of entry by the Administrator (or perhaps by the state) onto any premises and (2) for public disclosure of emission data required by the Administrator.

WATER

The *Rivers and Harbors Act of 1899* (the Refuse Act) absolutely prohibits Naval shore facilities and Naval ships from discharging refuse *into non-navigable tributaries of U.S. navigable waters*; i.e., no permits may be granted for such discharge. "Refuse" includes any pollutant (e.g., oil or sewage) and "navigable water" includes any water within the 3 mile limit (including interior waters) capable of bearing interstate commerce.

The Refuse Act also prohibits Naval shore facilities and Naval ships from discharging refuse *into U.S. navigable waters* without a permit from the Army Corps of Engineers. The Administration has exempted Naval (and other) ships from this permit requirement even though the only exemption provided for in the Act is for liquid refuse from streets and sewers.

However, unlike the Clean Air Act, enforcement of the Refuse Act is solely at the discretion of the Justice Department. Nevertheless, if a recent district court decision is upheld, citizens may be able to sue to enjoin issuance of permits where an environmental impact statement has not been prepared in compliance with NEPA. At this writing, the Refuse Act has been enforced against industry but not against federal agencies.

The *Oil Pollution Control Act of 1961*, as amended, is applicable to the Navy not by the law but by OpNav Instruction 6240.3A. This Act generally prohibits the discharge of oil or oily mixture (more than 100 parts per million) within 50 miles of any nation's coast.

The *Federal Water Pollution Control Act of 1970* (FWPCA) 1) may require the Navy to comply with federally-approved state water quality standards and with plans for meeting these standards (the state plans might require emission-limitations for Navy sources of water pollution), 2) prohibits oil discharge within 12 miles of the U.S. coast which causes a film, sheen, or discoloration in the water or which violates the federally-approved standards in 1) above (this prohibition is applicable to the Navy not by law but by OpNav Instruction 6240.3A), 3) requires any Commanding Officer with knowledge of an oil discharge in violation of the regulations in 2) above to immediately notify the Coast Guard (this provision is applicable to the Navy not by law but by OpNav Instruction 6240.3A) and 4) requires the Administrator to promulgate standards of performance for marine sanitation devices which must prevent the discharge of "inadequately treated" sewage into U.S. navigable waters from new and existing vessels. Thus the Administrator could define inadequately treated to prohibit sewage discharge from Navy ships in U.S. navigable waters. EPA is presently considering such a policy.

Unlike the Clean Air Act, no citizen suits are permitted; enforcement of the FWPCA is at the discretion of the Justice Department (and probably also by the states with respect to 1) above; this is apparently why San Diego and New Jersey believe they can sue the Navy for failure to comply with their water quality standards).

Two pieces of pending water legislation, one which was unanimously passed by the Senate, the other which was passed by the House 387-14, would 1) require EPA to establish effluent limitations for sources of water pollution, 2) more explicitly express a Congressional intent to waive the Navy's Constitutional immunity from state and local regulation, 3) take the permit program from the Refuse Act and put it under the FWPCA, thus making the program's applicability to the Navy at least debatable (only the House bill requires this permit program transfer), 4) reduce the number of impact statements by stating that NEPA is satisfied if federal pollutant discharges into U.S. navigable waters are authorized by a (EPA or state) permit, 5) require pollutants which "interfere" with public treatment systems to meet EPA-promulgated pretreatment standards (interference might be caused by the acidity or sheer volume of Naval ship discharge to public shore facilities) and 6) authorize citizen enforcement against violators (including the Navy) of effluent standards promulgated under the FWPCA.

In his 8 Feb. 1971 environmental message to Congress, President Nixon advocated "terminating all intentional discharges of oil and oily wastes from ships into the oceans by 1975, if possible, and no later than the end of this decade." In his 8 Feb. 1972 environmental message the President did not mention the 1975-1980 deadline. This failure to include a deadline may present an opportunity for the Navy to advise the Administration on when it can meet a no intentional discharge policy.

NOISE

The *Occupational Safety and Health Act of 1970* requires the Navy to adopt occupational noise standards consistent with (but not necessarily identical to) those promulgated by the Department of Labor on 29 May 1971. Pending legislation would set stricter standards.

The *Noise Abatement Act of 1970* requires the Navy to consult with the Administrator any time the Navy produces "objectionable noise." EPA's preliminary definition of objectionable noise would require consultation any time the existing noise level is increased.

On 29 Feb. 1972, the House overwhelmingly passed *H.R. 11021* which would prohibit a manufacturer (such as a government contractor) from distributing into commerce new products which do not meet noise emission regulations promulgated by EPA. This bill would also permit any citizen to sue any violator of these noise emission regulations.

NOTES

1. OpNav Instruction 6240.3A, referred to several times herein, was recently superseded by OpNav Instruction 6240.3B. The new instruction does not affect the analysis in this paper. Furthermore, Article 1272 of the Navy Regulations reaffirms the language of OpNav Instruction 6240.3A.

2. The analysis of the Federal Water Pollution Control Act's vessel sewage provisions, set forth on page 39, should be amended as follows. On 20 Jun. 1972 the Environmental Protection Agency issued the final vessel sewage regulations (37 F.R. 12391, 23 Jun. 1972). A "no discharge" standard was adopted. All new Navy vessels (vessels on which construction was initiated on or after the date of promulgation of DoD's implementing regulations) must meet the no discharge standard 2 years after DoD issues its implementing regulations. The law does not state when DoD must issue these regulations; the matter rests with the discretion of DoD.

All existing Navy vessels (vessels on which construction was initiated prior to the date of promulgation of DoD's implementing regulations) must meet this standard within 5 years of the date DoD issues its implementing regulations. Existing vessels are exempted from the no discharge requirement if they are equipped with primary treatment devices* within 3 years after DoD issues its implementing regulations. *This exemption continues as long as the device remains operable.* If primary treatment devices are installed on existing vessels more than 3 years after DoD issues its implementing regulations but before the effective date of the no discharge standard (date of DoD regulations + 5 years), the no discharge standard will apply to existing vessels 3 years after such effective date (i.e. 8 years after DoD issues its implementing regulations).†

*Primary treatment devices must reduce fecal coliform bacteria to no more than 1,000 per 100 milliliters and prevent the discharge of an effluent with visible floating solids.

†Further exemption from these standards, granted at the discretion of the President, the Secretary of Defense, or the Secretary of Transportation, is described on page 40.

I. INTRODUCTION

As noted in the foreword, the recent administrative and judicial actions taken against the Navy suggest the influence of environmental law upon Naval operations. These actions are based upon federal environmental legislation: the National Environmental Policy Act of 1969, the Clean Air Act of 1970, and the Federal Water Pollution Control Act of 1970. This paper analyzes the influence upon Naval operations of these and other pieces of federal legislation concerning air, water, and noise pollution. As such, this paper is of limited scope, because federal environmental legislation is only one part of environmental law. Other types of environmental law which could affect Naval operations and which consequently deserve analysis are: (1) local and state legislation* and (2) international law.[†] Furthermore, environmental law is not limited to air, water and noise pollution; it also centers on problems such as ocean dumping, radiation, pesticides, and solid wastes.

If the Navy violates federal air, water, or noise legislation, judicial enforcement is often sought. However, judicial remedies against the Navy are not easily obtained. There are three barriers which must be overcome by anyone attempting to sue the Navy for violation of environmental legislation:

- (1) Standing (is the litigant sufficiently aggrieved to be permitted to sue?).
- (2) Constitutional immunity of the Navy from regulation by state or local law, except where Congress gives its consent to such regulation (to what extent do the Clean Air Act, the FWPCA, and other federal environmental legislation waive this immunity and require the Navy to comply with state emission standards, permit requirements, and regulations?) and
- (3) Sovereign immunity (in what other instances is the Navy immune from suit for violation of the law?).

A. STANDING (IS THE LITIGANT SUFFICIENTLY AGGRIEVED TO BE PERMITTED TO SUE?)

It is implied by the "case or controversy" requirement of Article III, Sec. 2 of the U.S. Constitution and widely accepted among legal scholars that a truly adversary proceeding is essential to a proper resolution of any issue litigated in court.^{††} This issue of whether a litigant is sufficiently aggrieved to be permitted to bring suit is usually phrased: Does the litigant have standing to sue? Recent Supreme Court decisions, particularly *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), have given the law of standing judicial definition. These cases

*The issue of whether the Navy must comply with local and state legislation is examined in subsection (I)(B).

[†]On 17 Jun. 1970 the Canadian Parliament approved the Arctic Waters Pollution Prevention Act, which asserts Canada's jurisdiction to regulate all shipping in zones up to 100 nautical miles off its Arctic coasts in order to guard against pollution of the region's coastal and marine resources. Related legislation extends Canada's territorial sea from 3 miles to 12 miles and authorizes the Government to establish exclusive Canadian fishing zones in marine areas adjacent to the Canadian coast but beyond the new 12-mile limit.

Canada's unilateral assertion of jurisdiction of heretofore international waters could prompt other major maritime states, in the name of environmentalism, to do the same. Such pollution-free zones could affect Naval operations especially where environmentalism is used as a guise for nationalism.

^{††}The Administrative Procedure Act, 5 U.S.C. 702, provides in part "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." (Sec. 10)

establish two tests regarding the federal adversary requirement: (1) "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise," and (2) "whether the interest sought to be protected by the complainant is arguably within the zone of interests* to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S., 152-153.

In *Sierra Club v. Morton* (U.S. Sup. Ct. 19 Apr. 1972), 3 ERC 2039, the Supreme Court more explicitly defined the requirement of injury in fact[†]: 1) a party seeking review must allege facts showing that he is himself adversely affected^{††} (in this case the Sierra Club should amend its complaint and allege that one of its members is adversely affected) and 2) such party may, in this regard, allege that his aesthetic and environmental well-being was adversely affected. If the litigant meets this injury in fact test and the less rigorous zone of interest test he has standing to sue.

B. CONSTITUTIONAL IMMUNITY (WHEN MUST THE NAVY COMPLY WITH STATE OR LOCAL LEGISLATION?)*

When must the Navy comply with state or local legislation? This is a question of immunity, which is answered by application of three clauses of the U.S. Constitution: (1) Art. VI, Sec. 2 (The "Supremacy Clause"), which states: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding," (2) Art. I, Sec. 8, clause 14 which states: "The Congress shall have power . . . to make rules for the government and regulation of the land and naval forces," and most importantly, (3) Art. I, Sec. 8, clause 17 which states: "The Congress shall have the power . . . to

exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the States in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings. [Emphasis added.]

Thus, an attempt by a state or municipality to regulate through anti-pollution laws Naval bases on land purchased by the U.S. with state consent would be "to the contrary" of clauses 14 and 17

*The mandate to federal agencies to be environmentally conscious, stated in the National Environmental Policy Act of 1969, made ecology within the zone of interests to be protected by NEPA and thus virtually eliminated the chances of a case brought under NEPA being dismissed for failure to meet the zone of interest test. See, e.g., *Delaware v. Penn Central* (D.C. Del. 24 Feb. 1971), 2 ERC 1355.

[†]No question of zone of interests was presented. Specifically the court stated: "In deciding this case we do not reach any questions concerning the meaning of the 'zone of interest' test or its possible application to the facts here presented." (3 ERC 2041, footnote 5).

^{††}The Court was careful to note that the requirement that an individual show himself to be adversely affected does not affect his chances for obtaining injunctive relief adverse to a competing public interest. In this regard the Court stated

"The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable [injunctive] relief." (3 ERC 2044, footnote 15).

**Ensign Steven Davison's comprehensive memorandum, "State Power to Regulate Environmental Pollution Caused by Naval Shore Facilities, Shipyards, and Ships," INS 521-72, NATI 69-72 (14 Apr 1972) was helpful in the preparation of the main text of this summary.

which expressly reserve such regulation for the Congress.* The recent case of *McQueary v. Laird* (10th Cir. 21 Oct. 1971), 3 ERC 1184, spoke of this exclusive right of Congress to regulate the armed forces when it stated:

As to its proprietary military capacity, the Federal government has traditionally exercised unlettered control with respect to internal management and operation of federal military establishments. *Cafeteria Workers v. McElroy* 367 U.S. 886 (1961) *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Upon cession by a state to the national government of jurisdiction over property to be used for military purposes, the Congress has exclusive jurisdiction in respect thereto. *Howard v. Commissioners*, 344 U.S. 624; *Benson v. United States*, 146 U.S. 325 (1892); *Murphy v. Love*, 249 F.2d 783 (10th Cir. 1957), cert. denied 355 U.S. 958 (1958). [3 ERC 1187].

However, the Supreme Court has held that Congress, through federal statute, may waive the federal government's immunity and authorize states and/or municipalities to regulate land and naval forces or forts, magazines, arsenals, dockyards, and other needful buildings. Waiver of this immunity must be explicitly stated, at least with respect to clause 17.¹ This is because of the phrase "exclusive jurisdiction in all cases whatsoever." Nevertheless, environmentally-conscious states such as California argue that ambiguous language in federal pollution legislation[†] really means "waiver" while the government advances the argument that the language does not constitute a waiver. It is certainly possible that an environmentally-conscious judge might decide that federal air and water legislation explicitly waives immunity and thus requires the Navy to comply with state and local laws. It is equally possible that Navy failure to comply with such laws would not be well received by the news media and the public. Consequently the Navy may be forced by law or public pressure to comply with state and local anti-pollution laws.

C. SOVEREIGN IMMUNITY (WHEN IS THE NAVY IMMUNE FROM SUIT?)

The term sovereign immunity originated not in the U.S. Constitution but in the courts of feudal England. In those days the Government was the King and it was believed that the King could do no wrong. Consequently the courts respected the King's wish to be sued only at his consent. In modern times the Government continues to claim sovereign immunity when it is sued. However, in recent years Congress has enumerated exceptions to sovereign immunity.^{††} In addition,

*The preemption issue most often centers on whether state or local laws are "to the contrary" of federal laws. For instance, in *American Waterways Operators v. Askew* (M.D. Fla. 10 Dec. 1971), 3 ERC 1429, cert. granted, 40 U.S.L.W. 3497 (17 Apr. 1972), it was held that a state statute imposing strict liability for oil spills was preempted by a federal law (The Federal Water Pollution Control Act). See also, concerning air, water, and noise pollution respectively, *Huron Portland Cement Co. v. City of Detroit*, 366 U.S. 440 (1960) [local regulation of vessel boiler-smoke-emission for public health is not preempted by federal licensing statute for public safety], *Northern States v. Minnesota* (U.S. Sup. Ct. 3 Apr. 1972), 3 ERC 1976 [State regulation of atomic power plant's thermal pollution is preempted by federal law (the Atomic Energy Act)], and *Lockheed Air Terminal v. Barbark* (C.D. Cal. 1970), 2 ERC 1005 [local ordinance restricting use of airspace is preempted by Federal Aviation Act of 1958].

[†]The issue of whether the Navy must comply with state and local air, water, or noise legislation is examined in the appendix to this section.

^{††}The Tucker Act (28 U.S.C.A. 1346, 1481) consents to suits for damages for breach of contract. The Federal Tort Claims Act (28 U.S.C.A. 1346) consents to suits for negligence. Present and pending federal air, water, and noise legislation consents to citizen suits against alleged military violation of emission or effluent standards issued under such legislation. The issue of whether such legislation requires the military to comply with state or local standards is examined in the appendix to this section.

the U.S. Supreme Court has provided for non-statutory review when a) a federal official has exceeded the scope of his statutory authority,* or b) a federal official's statutory authority is unconstitutional.²

At this point it should be noted that a citizen may seek a writ of mandamus from the court to compel a government official to perform a ministerial or non-discretionary act, *United States v. Walker* 409 F.2d 477 (9th Cir. 1969). Mandamus is historically an extraordinary writ but in recent years has been looked upon more favorably, probably because it has been given statutory definition (28 U.S.C. 1361). However, 28 U.S.C. 1361 does not grant jurisdiction for the purpose of injunctive or declaratory relief. *McQueary v. Laird* (10th Cir. 21 Oct. 1971), 3 ERC 1184.

*Recent cases which have relied on this exception to deny sovereign immunity are *California v. Davidson* (N.D. Cal. 19 Jan. 1971), 3 ERC 1157, [violation of applicable (state and local) water quality standards is outside the scope of defendant's (Ft. Ord's) statutory authority as stipulated by the Federal Water Pollution Control Act of 1970] and *Izaak Walton League v. Macchia* (D.C. N.J. 16 Jun 1971), 2 ERC 1661, [both federal and state officials exceeded the statutory authority as prescribed by the National Environmental Policy Act]. However, the defense of sovereign immunity succeeded in the recent case of *McQueary v. Laird* (10th Cir 21 Oct 1971), 3 ERC 1184, [military officials' storage of CBW ammunition was within the scope of statutory authority as prescribed by the Military Storage Act, P.L. 91-121, and Art. 1, Sec 8, Clause 17, of the U.S. Constitution].

APPENDIX: DOES FEDERAL WATER, AIR, OR NOISE LEGISLATION WAIVE THE NAVY'S CONSTITUTIONAL IMMUNITY FROM STATE OR LOCAL REGULATION?

APPLICABILITY OF STATE AND LOCAL WATER LEGISLATION TO NAVAL OPERATIONS

The Federal Water Pollution Control Act as presently written is ambiguous about waiver of the Navy's constitutional immunity from state and local regulation; it requires the Navy (and other federal agencies) to comply with "applicable water quality standards." Despite the ambiguity of the word "applicable" *California v. Davidson*, (N.D. Cal. 19 Jan. 1971), 3 ERC 1157, stated: "unless and until the President determines otherwise, any action by defendant [Ft. Ord] in violation of [non-federally approved] state or local water pollution standards exceeds the specific limitation found in the amended Sec. 466i [requiring compliance with "applicable water quality standards"] and renders him subject to suit." 3 ERC 1158.

However, consider the President's definition of the term "applicable water quality standards" as stated in Sec. 11 of the FWPCA: "(J) 'Applicable water quality standards' means water quality standards adopted pursuant to Section 10(c) of the Federal Act [which section requires that state water quality standards be federally-approved]." Thus, in response to a state's attempt to apply non-federally-approved pollution standards to Naval vessels or shore facilities, one might argue that the *Davidson* decision was clearly erroneous in that it was based on the President's failure to grant an exemption but ignored the President's limitation of the phrase "applicable . . ." to federally-approved state and local water quality standards. An additional argument is available if a state or municipality attempts to regulate Naval (or other) vessels. One would argue that *Davidson's* applicability, if any, is limited to bases like Ft. Ord and cannot be extended to vessels, which are capable of meeting the varying and often-changing pollution requirements of the several coastal states only through continual, expensive, and operationally-infeasible overhaul schedules.

In addition to employing the *Davidson* precedent to circumvent the defense of "no explicit waiver" a state could argue that the Navy is violating the state's *federally (EPA)-approved* water quality standard (the standard violated in *Davidson* was apparently not federally approved). This strategy is consistent with the President's definition of applicable and may succeed, at least with respect to shore facilities, if the court decides that Congress intended to and is permitted to authorize EPA to waive the federal government's immunity under the Supremacy Clause and clauses 14 and 17

However, if pending legislation to amend the FWPCA becomes law, state arguments based on *Davidson* or on federally-approved water quality standards may be unnecessary. A bill which was unanimously passed by the Senate (S. 2770, 2 Nov. 1971) and a bill which was recently passed by the House (H.R. 11896, 31 Mar. 1972) each would amend the FWPCA to require compliance with "Federal, State, interstate, and local requirements" instead of with "applicable water quality standards." This bicameral language, which is identical to that in the existing Clean Air Act (see discussion below concerning air legislation), is more likely to be interpreted as an explicit Congressional waiver of the Navy's immunity from state and local regulation than is the existing language. This likelihood is based on the substitution of "Federal, State, interstate and local" for "applicable" and the substitution of "requirements" for "standards" (see following note on air

legislation for further explanation of why the substituted words constitute a more explicit Congressional waiver of immunity, respectively replacing sections 118, 116 and 304 of the Clean Air Act with the virtually identical sections 313, 510, and 505 of H.R. 11896 and S. 2770).

Thus it would seem to be in the Navy's interest to see that the existing language is retained, or at least more closely approximated. In so doing, the Navy might point to the House Committee comments which, unlike the Senate/House bill, state that the Navy must comply with "*applicable* Federal, State, and local requirements" (House Report No. 92-911, p. 165; emphasis added). The Navy also might argue that the language of the bill could be read to go beyond the *Davidson* decision by requiring Navy bases and Navy vessels to comply with federal, state, interstate, and local emission standards and limitations. As noted above, the Navy would be faced with grave financial and operational problems if its vessels were obliged to meet the varying and often-changing pollution regulations of the several coastal states; vessels are much more amenable to uniform federal standards.

APPLICABILITY OF STATE AND LOCAL AIR LEGISLATION TO NAVAL OPERATIONS

Sec. 118 of the Clean Air Act requires the Navy, with limited exemptions available from the President and the Administrator, to comply with "Federal, State, interstate, and local requirements respecting control and abatement of air pollution." Do these words constitute an explicit Congressional waiver of immunity, obliging the Navy to comply with state and local pollution laws? If so, must such laws be federally-approved before Navy compliance becomes mandatory? Following are some observations on these issues based solely on the language of the Act. A definitive resolution of the issues would necessitate analysis of the House and Senate reports and is beyond the scope of this paper.

Sec. 116 suggests that definition of the term "requirements" does not include emission standards or limitations. Specifically, Sec. 116 stated in pertinent part: "nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution."

However, Sec. 304 implies that definition of the term "requirements" does include emission standards or limitations. Specifically, Sec. 304 authorizes any citizen to sue the Navy if it allegedly violates "an emission standard or limitation under this Act."

The latter interpretation of the scope of the term "requirements" seems more tenable. Two rhetorical questions support this conclusion: (1) If "requirements" does not include emission standards or limitations what does it include? (2) Assuming, *arguendo*, that the term "requirements" does not include emission standards or limitations, why is any citizen authorized to sue the Navy for alleged violation of standards or limitations under this Act? (Nevertheless, an argument remains that this rationale is not *explicitly* stated in the Act and thus does not constitute a Congressional waiver of the Navy's constitutional immunity.)

Assuming the latter definition of the term "requirements" is correct, the Navy is obliged to comply with federal, state, interstate, and local emission standards and limitations under this Act.

Because of Sec. 116, it is at least arguable that a state or local standard or limitation is a "standard or limitation under this Act." Sec. 116 does not require that such a standard or limitation be federally approved. Indeed, Sec. 116 permits a state to set a standard or limitation which is stricter than the federally-approved standard. In this respect, Sec. 116 provides in pertinent part:

... if an emission standard or limitation is in effect under an applicable implementation plan [Sec. 110 requires that such plans must be federally approved] or under Section 111 or 112 [these sections authorize federal promulgation of emission standards for sources of air pollution], such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section [Sec. 116 is set forth in its entirety on page 18.]

EPA's "Regulations on Air Pollution from Federal Government Activities," issued pursuant to Executive Order 11507, appear to confirm the observations on the two issues posed at the outset of this footnote. That is, the regulations (which apparently represent the view of the executive branch) suggest that the words "shall comply with Federal, State, interstate, and local requirements" oblige the Navy to comply with state and local emission standards and limitations whether or not they are federally approved. The regulations state in pertinent part: "Federal facilities and buildings shall conform to the air pollution standards prescribed by the State or community in which they are located." (36 F.R. 22417, 25 Nov. 1971). The term "federal facilities" includes naval bases and vessels.

The argument presented in the above paragraphs is in no way a definitive resolution of the two issues posed at the outset of this section of the appendix; ultimate resolution of these issues will be made by the courts. It does seem clear, however, that there is a good possibility that the courts will require the Navy to comply with state and local air pollution laws whether or not they are federally approved. Thus, it seems to be advisable for the Navy to familiarize itself with the air pollution laws in those states in which it has operations emitting air pollutants.

APPLICABILITY OF STATE AND LOCAL NOISE LEGISLATION TO NAVAL OPERATIONS

There is no indication of a Congressional waiver of the Navy's immunity from state or local regulation in either present or pending noise legislation.

NOTES

1. See, for example, *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), reh. den. 358 U.S. 805 and *Oklahoma City v. Sanders*, 94 F.2d 323 (10th Cir. 1938).

2. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 701-702 (1949), *Dugan v. Rank*, 372 U.S. 609, 621-622 (1963), and *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962).

II. THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969*

Congress has enacted one piece of legislation which establishes a national environmental policy and several pieces of legislation which seek to implement this policy in particular areas such as air, water and noise pollution. The National Environmental Policy Act of 1969 (NEPA),¹ which was the legal basis of the Operation Snowy Beach suit, establishes as federal policy the use of "all practicable means and measures . . . to foster and promote the general welfare [and] to create and maintain conditions under which man and nature can exist in productive harmony."[†] To this end NEPA requires the Navy and all other federal agencies to file a five-point environmental impact statement for any federal "action" which "significantly affects" the quality of the human environment, except when doing so presents a clear conflict with other statutory authority.

A. DETERMINATION OF WHETHER AN IMPACT STATEMENT MUST BE FILED

It was stated above that Federal agencies must file an impact statement for *any* action which significantly affects the quality of the human environment, except when doing so presents a clear conflict with other statutory authority. The following paragraphs present the legal basis for this impact statement criterion.

Section 102 of NEPA provides, in pertinent part: "The Congress authorizes and directs that, *to the fullest extent possible*: . . . (2) all agencies of the Federal Government shall - . . . (c) include in every *recommendation or report* on proposals for legislation and *other major Federal actions significantly affecting* the quality of the human environment, a detailed statement by the responsible official on - (1) the environmental impact of the proposed action."² Thus the Navy, because it is a federal agency, must issue an impact statement

- 1) to the fullest extent possible, whenever
- 2) a recommendation or report on proposals for legislation or some other major federal action significantly affects the quality of the human environment.

A close reading of section 102 illustrates that the phrases "recommendation or report" and "other major federal action" are applicable to all federal actions. This assertion is based in part upon section 102 which provides: "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions. . . ."³ All federal (Navy) actions originate with a recommendation or report on proposals for legislation. This is because all federal actions are preceded by appropriation request (proposals for legislation) which are justified by recommendations or reports. The words "and other" imply that a recommendation or report on proposals for legislation is also a major federal action. Since all federal

*Proposed amendments which would weaken NEPA are examined in subsection IV(D)(3) of this paper.

[†]Sec. 101(a). In response to this legislation the President has ordered federal agencies to take the lead in the environmental movement. Specifically, Executive Order 11514, "Protection and Enhancement of Environmental Quality," 35 F.R. 4247, 5 Mar. 1970 states: "The Federal Government shall provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct these policies, plans and programs so as to meet national environmental goals."

actions are preceded by recommendations for proposed legislation (appropriations), all federal actions are defined by NEPA to be major federal actions.*

Common sense also requires a conclusion that all federal actions which may have a significant effect on the quality of the human environment are major federal actions. To conclude otherwise would permit one not to write an impact statement for a federal action which has a significant environmental effect on the grounds that the action is not major. For instance \$40 worth of highly toxic pesticides dumped by the Navy into a river which provides drinking water for 1/5 of a state's cattle will certainly have a significant environmental effect. Yet if the individuals who propose the pesticide dumping are not environmentally conscious, they may not file an impact statement, on the ground that only \$40 worth of highly toxic pesticides is not a major federal action.[†] This would be inconsistent with the purpose of NEPA which is "to promote efforts which will prevent or eliminate damage to the environment."⁴ Thus, interpretation of the words "major Federal action" to include *all* federal actions which may have a significant effect on the quality of the human environment will force those who are not environmentally conscious to evaluate the critical issue of environmental significance rather than the irrelevant issue of whether the federal action is major. This is the purpose of NEPA.

The preceding interpretation of the phrases "recommendation or report on proposals for legislation" and "major Federal action" means that section 102 requires federal agencies to issue an impact statement "to the fullest extent possible" whenever any Federal action "significantly affects" the quality of the human environment. The possibility of using the phrase "to the fullest extent possible" as an escape hatch was recently rejected by the D.C. Circuit Court of Appeals in *Calvert Cliffs' v. AEC* (23 Jul. 1971), 2 ERC 1779. Specifically, the Court stated:

Of course, all of these Section 102 duties are qualified by the phrase "to the fullest extent possible." *We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies;* it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed the requirement of environmental consideration "to the fullest extent possible" set a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts. . . . Thus the Section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority.^{††} Considerations of administrative difficulty,

*The Council on Environmental Quality (CEQ) appears to come to a similar conclusion. Its 23 Apr. 1971 guidelines for federal agencies under NEPA state in part "actions include but are not limited to: (i) recommendations or favorable reports related to legislation including that for appropriations." Council on Environmental Quality, "Statements on Proposed Federal Actions Affecting the Environment: Guidelines," 36 F.R. 7724, 23 Apr. 1971. The argument in the main text is also supported by the recent case of *Environmental Defense Fund v. TVA* (E.D. Tenn. 11 Jan. 1972), 3 ERC 1553, in which the Court stated:

In analyzing the pertinent portions of 102(2)(c), it is noted that the detailed statement is required to be included "in every recommendation or report on proposals for legislation." Since the Tellico project is funded by annual Congressional appropriations, it would appear that a request for such appropriation would be a 'proposal for legislation' within the meaning of section 102(2)(c). Consequently, each appropriation request after January 1, 1970 would be required to be accompanied by a detailed environmental impact statement." (3 ERC 1556).

[†]However, in *Natural Resources Defense Council v. Grant* (E.D. N. Car. 15 Mar. 1972), 3 ERC 1883, the court stated: "A 'major federal action' is federal action that requires substantial planning, time, resources, or expenditure." (3 ERC 1890). The federal action in question in this case (66 miles of federally-funded stream channelization) met the court's definition. In view of the argument made in the main text, it seems advisable to limit the court's definition of major federal action to the facts of this case. See also *Davis v. Morton*, (D. N. Mex., 21 Dec. 1971), 3 ERC 1546, 1547.

^{††}The court made it clear that federal agencies will have considerable difficulty in proving that a clear conflict of statutory authority exists. See 2 ERC 1789. See also *Ely v. Velde* (4th Cir. 8 Nov. 1971), 3 ERC 1280.

delay or economic cost will not suffice to strip this section of its fundamental importance.[*] [2 ERC 1782-1783; emphasis added].

Thus, the following conclusion obtains from analysis of the phrases "recommendation or report on proposals for legislation," "other major Federal actions" and "to the fullest extent possible:" Federal agencies (herein the Navy) must issue an impact statement for any federal action which "significantly affects"[†] the quality of the human environment unless there is a clear conflict with other statutory authority.

B. USE OF NEPA TO INFLUENCE NAVAL OPERATIONS

Failure to comply with NEPA's procedural requirements (the 5 points) or failure to file an impact statement at all where an existing or proposed federal action "significantly affects" the quality of the human environment subjects the federal action to court injunction. Injunctions for procedural insufficiencies are fairly common.^{††} Injunctions for failure to file an impact statement on the ground that the agency has made an improper determination of when environmental quality may be "significantly affected" are not granted as frequently, primarily because most federal agencies file impact statements for significant actions but also because injunctions of this nature are

*It is interesting to note that a District Court case decided after the Circuit Court decision in Calvert Cliffs took an opposite view of this phrase. In *Businessmen For the Public Interest v. Resor* (N.D. Ill., 14 Oct. 1971), 3 ERC 1216, the Court stated:

This phrase reflects the wisdom of Congress and the realization that its highminded and laudatory goals are not capable of instant achievement and very probably are not capable of full achievement at any time. These words constitute a recognition that . . . the desires and goals of Congress must be applied by the executive branch of government consistent with reality and common sense, and that all that we can truly hope to achieve is the best effort possible at this time under existing circumstances. 3 ERC 1216, 1221.

This District Court decision, which ignores the precedent of the Fifth Circuit in Calvert Cliffs, is cited by the Administration in its letter to Congress seeking repeal of the Refuse Act as partial grounds for circumventing the holding of *Kalur v. Resor* (D.C.D.C. 22 Dec. 1971), 3 ERC 1458. This case had the effect of halting the Administration's permit program under the Refuse Act (see subsection IV(A)).

[†]OpNav Instruction 6240.2B of 10 Nov. 1971, which implements a 9 Aug. 1971 DoD directive, provides guidelines for determining "significance."

^{††}See, for example, the recent case of *Natural Resources Defense Council v. Morton* (D.C.D.C. 17 Dec. 1971), 3 ERC 1473, in which it was held that the Federal Power Commission's impact statement concerning sale of off-shore oil and gas leases was procedurally insufficient in that it failed to sufficiently discuss alternative means to meet the nation's energy shortage. (In this regard it appears that the litigation concerning the North Slope oil will center on whether the Department of the Interior, before granting a permit for an Alaskan route, fully examined the Canadian alternative.) The court's permissive attitude toward injunctions for procedural deficiencies is further illustrated by the fact that only nominal security [collateral deposited with the court against the possibility of wrongful preliminary injunctions] was required of those who sought the injunction. Most courts share this attitude.

However, a court might not issue an injunction against a federal action represented by a procedurally insufficient impact statement where the interest of national security outweighs the environmental risk represented by an incomplete impact statement. In *McQueary v. Laird* (10th Cir. 21 Oct. 1971), 3 ERC 1184, a case dealing with storage of CBW ammunition, the court held that though an environmental impact statement was required, the judiciary should not involve itself in the internal administration of military bases. See also *Committee for Nuclear Responsibility v. Schlesinger* (U.S. Sup. Ct. 6 Nov. 1971), 3 ERC 1276 [but see Justice Douglas' dissent]. However, in *Citizens v. Laird* (S.D. Me. 21 Jan. 1972), 3 ERC 1580, the court acted upon the assumption that the Navy must comply with NEPA. Apparently the amphibious landing in Reid State Park, unlike the storage of CBW ammunition, did not pose a national security issue of such significance to prompt the court to carve out an exception from the requirements of Sec. 102(c). It is, of course, arguable that had the Navy alleged that Operation Snowy Beach was in the interest of national security the Laird court might have come to the conclusion that the McQueary court came to spontaneously.

granted only where there is clear evidence that the agency has either abused its discretion or acted in an arbitrary or capricious manner or, if a hearing was held, where the agency's decision was not based upon substantial evidence.*

The Navy, through the Environmental Protection Division of the Office of Chief of Naval Operations (Op-45), has drawn up guidelines which implement the letter and spirit of NEPA throughout the Navy.⁵ Since May 1971 the Navy has filed the following impact statements:⁶

| | | |
|---------------|-------|--|
| 14 May 1971: | draft | Defense Office Building, Washington, D. C. |
| 14 May 1971: | draft | Naval Submarine Base, New London, Conn., land acquisition. |
| 14 May 1971: | draft | Naval Security Group Activity, Homestead, Fla., land acquisition. |
| 28 May 1971: | draft | Naval Air Station, proposed sewage disposal facility, LeMoore, Calif. |
| 18 Jun. 1971: | draft | Sanguine Test Facility, Chequamegon National Forest, Wisc. |
| 25 Jun. 1971: | draft | Navy F-14 aircraft, in advanced development stage at Grumman Aerospace Corporation. |
| 27 Aug. 1971: | draft | acquisition of 508 acres of land, Naval Station, Norfolk, Va. |
| 3 Sep. 1971: | draft | ammunition pier, Sella Bay, Guam, Mariana Island. |
| 17 Sep. 1971: | final | F-14 Fighter Aircraft, constructed by Grumman Aerospace Corporation. |
| 17 Sep. 1971: | final | land acquisition, Naval Security Group Activity, Homestead, Fla. |
| 17 Sep. 1971: | final | use of target ship hulls in exercises at sea. |
| 24 Sep. 1971: | final | land acquisition, Naval Submarine Base, New London, Conn. |
| 12 Nov. 1971: | draft | Military use of Kahoolawe Island target complex, Hawaii. |
| 4 Feb. 1972: | draft | Atlantic Fleet Weapons Range, Puerto Rico. |
| 10 Mar. 1972: | final | Kahoolawe Island target complex. |
| 17 Mar. 1972: | final | Naval Air Station, land acquisition for sewage treatment facility at LeMoore, Calif. |

*For instance, a citizen's suit challenging the impact statement submitted for Naval target exercises on Kahoolawe Island, Hawaii was recently dismissed. *Cravalho v. Laird* (D.C. Haw. 25 May 1972), Civil No. 71-3391. However, in *Scherr v. Volpe* (D.C. Wisc. 28 Dec. 1971) 3 ERC 1590, the court granted a preliminary injunction against conversion of 12 miles of Wisconsin two-lane highway to four-lane freeway because the Federal Highway Administration had failed to prepare an environmental impact statement respecting this federal action. Failure to file such statement [i.e., failure to find a "significant" environmental effect] was arbitrary and unreasonable. See also *Businessmen v. D.C. City Council* (D.C. D.C. 15 Mr. 1972), 3 ERC 1906. However, an attempt to obtain such an injunction against the Navy must overcome the national security defense described in footnote †† on page 11.

| | | |
|---------------|-------|--|
| 31 Mar. 1972: | draft | land acquisition, Sewells Point, Norfolk, Va. |
| 7 Apr. 1972: | final | relocation of target facilities from Aqua Cay to Cross Cay, Puerto Rico. |
| 14 Apr. 1972: | draft | Naval Ammunition Depot land acquisition, Oahu, Hawaii. |
| 21 Apr. 1972: | draft | channel at Naval Submarine Base, New London, Conn. |
| | final | low frequency communications systems. |
| 19 May 1972: | draft | basin for floating drydock, Newport, R. I. |

As noted above, NEPA set in motion a flurry of federal environmental legislation. Of these new laws, the laws pertaining to air, water and noise pollution will have the most significant impact upon Naval operations. The impact of the federal air, water, and noise pollution laws upon Naval operations will be analyzed in Sections III, IV, and V, respectively.

NOTES

1. 42 U.S.C.A. 4321 (1971 Pocket Part).
2. Sec. 102(2), 102(2)(c)(i); emphasis added.
3. Sec. 102(2), 102(2)(c)(i).
4. Sec. 2.
5. OpNav Instruction 6240.2B of 10 Nov. 1971.
6. The Environment Reporter, "Current Developments," Wash., D.C.: B.N.A. Inc., 1971, July 1971-June 1972.

III. FEDERAL AIR LEGISLATION

In the past decade increasingly stringent federal legislation has been enacted to ensure that man-made air pollution does not exceed the atmosphere's waste disposal capacity. This legislation is presently represented by the Clean Air Act of 1970, which is best understood after a brief examination of the federal legislation which preceded it.

A. BRIEF HISTORY

In general, federal air pollution legislation initially attempted to abate air pollution by giving financial and technical assistance to the states which then made their own determination of how best to abate the pollution. However, because air recognizes no border, effective abatement procedures often required interstate agreement. Adjoining states generally were unable to reach agreement. Intrastate controls were also weak, primarily because effective intrastate abatement requires strict and expensive controls upon high-employment, high tax revenue-producing industries, which can circumvent such controls by relocating in a state with weak controls. The acknowledged failure of interstate agreements and intrastate controls to abate air pollution eventually persuaded Congress to establish a dual system of national air pollution control, which is utilized in the Clean Air Act of 1970. This dual system, which will be explained in detail in the subsequent analysis of the Clean Air Act, generally consists of (1) national ambient (open-air) air quality standards for certain pollutants, which must be achieved by the states within three years of promulgation according to a federally-approved state plan and (2) national source emission standards for new stationary and mobile sources of air pollution. Thus a trend from state control to federal control is manifest in the history of federal air pollution legislation, a brief summary of which is presented in the following paragraphs.

The federal effort to abate air pollution began in 1955 with Public Law 84-159. This Act authorized the expenditure of \$5 million annually for five years to support federal research and to give technical assistance to city and state agencies and to other groups concerned with air pollution abatement. This initial piece of federal air pollution legislation was most directly influenced by the efforts of Los Angeles to control smog in the early 1940's and by an incident in the industrial community of Donora, Pennsylvania during October of 1948 in which 20 people died and almost 6,000 people became ill because of a dense smog coupled with a prolonged temperature inversion.

However, President Eisenhower's Bureau of the Budget was reluctant to proceed further with federal efforts to abate air pollution; it believed that the control of air pollution was a problem for the state and local legislatures.

It was not until 1961, under the Kennedy Administration, that Congress' efforts to abate air pollution regained momentum. Kennedy's belief in greater federal control, coupled with the news of the "killer smog" in London in late December 1962, persuaded Congress to pass the Clean Air Act of 1963. This Act authorized the expenditure of \$95 million for a three-year program of research, grants to state and local agencies, and abatement procedures. The most important research centered on control of motor vehicle exhaust, removal of sulfur from fuel, and development of air quality criteria for major air pollutants. The resultant air quality criteria were used in the 1967 Act as the basis of national ambient air quality standards.

The 1963 Act's abatement procedure was cumbersome at best but did begin a trend toward greater national pollution controls. The procedure provided for federal conferences, hearings, and court actions for cases of interstate pollution in which the local agency failed to act. The case of *U.S. v. Bishop Processing Company* (4th Cir. 1970), 1 ER 1013, in which the Government attempted to abate interstate pollution from a rendering plant, is a perfect monument to the inefficiency of this abatement procedure. The Government utilized the full enforcement procedure against the Bishop Processing Company and yet it took more than 7 years to force the company to abate its air pollution.

Probably the most significant aspect of the Clean Air Act of 1963 was that it shifted the nation's attention to the problem of air pollution from automobiles. In January 1965, Senator Muskie, after holding hearings in his Senate Subcommittee on Air and Water Pollution, introduced a bill providing for federal standards for air pollution from new automobiles. The Johnson administration, which had signed the Clean Air Act of 1963, did not support this bill. It preferred to give the automobile companies an opportunity for voluntary cooperation before subjecting them to federal legislation. The Administration's stand received harsh criticism from both the public and the press. Thereafter, the Administration reversed its position. In October of 1965 the Muskie bill became law. This Act, known as the Motor Vehicle Air Pollution Control Act, authorized the Secretary of HEW to establish emission limitations for all new motor vehicles.

Public pressure for air pollution abatement continued to increase. This pressure was catalyzed in November of 1966 when a 4-day temperature inversion in New York City allegedly caused the death of 80 persons. In January of 1967, President Johnson called for more comprehensive national controls. He recommended national ambient air quality standards and national source emission standards. This proposal received stiff opposition from industry. Even Senator Muskie expressed reservations. The opposition was further incensed by an HEW decision in March 1967 which proposed sulfur standards which industry claimed would eliminate the use of coal in the nation's largest metropolitan areas. The HEW decision was also opposed by Senator Randolph, Chairman of the Senate Public Works Committee and Senator of the coal-producing state of West Virginia. Not surprisingly, the Administration's proposals for tough legislation were considerably weakened (national source standards were not required) by the time the bill became law as the Air Quality Act of 1967. The Act required HEW to establish air quality control regions, issue criteria, and recommend control techniques. The states were responsible for the actual setting of regional standards (which were subject to HEW approval) and for the implementation and enforcement of these standards. In addition, the Secretary of HEW was given power to seek an injunction against any polluter if he has reason to believe that an air pollution emergency exists in any particular city. This authority was retained in the Clean Air Act of 1970 and was utilized in December of 1971 in response to an air inversion in Birmingham, Alabama.

By 1970 the grass-roots environmental movement had gained such momentum that more stringent national air pollutional controls were inevitable. The result was the Clean Air Act of 1970 which is one of the toughest pieces of legislation ever enacted by Congress, not only because of the dual system of ambient and source standards but also because of a provision which authorizes any citizen to prosecute any violator (e.g., the Navy) of such standards. Detailed analysis of this Act is presented in the following paragraphs.

B. THE CLEAN AIR ACT OF 1970*

As noted above, the Clean Air Act of 1970 utilizes a dual system of national ambient and source standards to abate air pollution. The *ambient standards* set a maximum permissible level (calibrated in parts per million) of specified pollutants in the ambient air at any time. States must submit implementation plans to EPA which describe how the states will achieve these national standards. The law permits the states to require emission limitations for sources of air pollution, transportation controls, land use policy, or any other methods necessary to meet the national standards. The state plans, if applicable to the Navy,[†] will probably have an impact upon Naval operations. For example, the plans of California, Florida, Guam, Hawaii, and Virginia generally (1) establish deadlines – some as early as June 1972, by which incinerators, steam generators, smoke emission, and other sources of air pollution must meet specified emission standards and (2) require persons who wish to construct or continue to operate sources which may emit air pollutants (a) to register such sources with the Board of Health and (b) to apply for a permit to construct or operate such sources from the Board of Health.

The national *source emission standards* are established by EPA for those new mobile and stationary sources of air pollution whose emission may contribute significantly to air pollution which endangers the public health or welfare. At this writing EPA has promulgated source standards for automobiles, large incinerators, fossil-fuel steam-generators, nitric-acid plants, portland-cement plants, and sulphuric-acid plants.

This paper will now examine provisions of the Clean Air Act of 1970 concerning 1) applicability to the Navy, 2) citizen enforcement, 3) government procurement restrictions, 4) inspections, monitoring, and right of entry, 5) ambient air quality standards, and 6) source emission standards.

1. Applicability to Navy (Sec. 118 and Sec. 116)

As noted in the appendix to section I of this paper, section 118 and section 116, when considered in light of section 304, probably require the Navy to comply with state or local emission standards or limitations, whether or not they are federally approved.^{††} The specific language of section 118 and section 116 is as follows:

Sec. 118. Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any

*As of 12 Jun. 1972 none of the bills to amend the Clean Air Act of 1970 pending in either the House or the Senate would influence naval operations.

[†]The appendix to section I illustrates that the federally-approved state plans are probably applicable to naval base operations. If applicable, any citizen is authorized to sue the Navy if it violates an emission standard required by a plan. Specifically, Sec. 304 of the Clean Air Act states in pertinent part "any person may commence a civil action on his own behalf – (1) against any person (including (i) the United States, and (ii) any other government instrumentality or agency . . .) who is alleged to be in violation of (a) an emission standard or limitation under this Act."

^{††}State pollution legislation is often specific. For instance, New Jersey's Air Pollution Control Code states: "No person shall cause, suffer, allow or permit smoke from any fuel burning equipment, the shade or appearance of which is darker than No. 2 of the Ringelmann Smoke Chart, to be emitted into the open air." (Chapter 4, Sec. 2.1). Enforcement of this statute against a cement block factory was upheld in *Department of Health v. Concrete Specialties* (N.J. Super. Ct. 1970), 3 ERC 1344. The constitutionality of the Ringelmann standards was recently upheld in *Arizona Mines* (Ariz. 23 Apr. 1971), 2 ERC 1526.

property or facility, [*] or (2) engaged in any activity resulting, or which may result, in discharge of air pollutants, *shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution* to the same extent that any person is subject to such requirements. *The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so, except that no exemption may be granted from Section 111, and an exemption from Section 112 may be granted only in accordance with Section 112(c).* No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. *Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods of not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions for the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.* [Emphasis added.]

Sec. 116. Except as otherwise provided in sections 209, 211(c)(4), and 233 (pre-empting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under Section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

2. Citizen Enforcement (Sec. 304)

Perhaps the most significant section of the Clean Air Act is Section 304 which permits any citizen to sue the Navy if it fails to obey an emission standard or limitation under the act.[†] Section 304 provides, in pertinent part:

(a) Except as provided in subsection (b) [re: notice and res judicata], *any person may commence a civil action on his own behalf - (1) against any person (including (i) the United States and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator . . . (d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such award is appropriate.* [This is a bar to frivolous or harassing litigation; emphasis added].

*"Facility" is defined by the President in Executive Order 11507 (4 Feb. 1970) to include naval ship and shore activities. See subsection IV(c)(1).

[†] State enforcement is provided for in Sec. 116. Federal enforcement is provided for in Sec. 113.

3. Naval Procurement from Violators of Act Prohibited (Sec. 306)

The Navy and all other federal agencies are prohibited from procuring goods, materials or services from any person who is convicted of an *intentional* violation of (1) any enforcement order issued by the Administrator or (2) any emission standard for new stationary sources of air pollution¹ or sources of hazardous air pollutants.² This procurement prohibition was implemented by Executive Order 11602 (30 Jun. 1971)³ which appears to limit the prohibition to the plant at which the violation occurred. The specific language of section 306 is as follows:

No Federal agency may enter into any contract with any person who is convicted of any offense under Section 113(c)(1) for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected

... (c) [The President shall, by 30 Jun. 1971, issue an order effectuating the purpose of 306 (a)]

Section 113(c)(1) states:

Any person who knowingly --

“(A) violates any requirement of an applicable implementation plan during any period of Federally assumed enforcement more than 30 days after having been notified by the Administrator under subsection (a)(1) that such person is violating such requirement, or (B) violates or fails or refuses to comply with any order issued by the Administrator under subsection (a), or (C) violates section 111(e) or section 112(c) shall be punished by a fine of not more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

Since this section seems to require a court conviction and since the prohibition is limited to the plant at which the violation occurred, it is not likely that this section will have a significant impact upon Naval operations. Nevertheless, to be on the safe side the Navy might ensure that its contractors adhere to the Administrator's enforcement orders, to the new stationary source standards, and to standards for hazardous air pollutants.*

4. Inspections, Monitoring, Right of Entry (Sec. 114)

Section 114 authorizes the Administrator of the Environmental Protection Agency to “require the owner or operator of *any* emission source” to keep records, make reports, use designated monitoring equipment, or “provide such other information, as he may reasonably require;” (emphasis added). In addition, section 114 gives the Administrator “a right of entry to, upon, or through *any* premises in which an emission source is located” (emphasis added). The Administrator may delegate this power to the states “except with respect to new sources owned or operated by

*Executive Order 11602 requires that the Federal Procurement Regulations and the Armed Services Procurement Regulations “be amended to require, as a condition of entering into, renewing, or extending any contract for the procurement of goods, materials, or services ... inclusion of a provision requiring compliance with the Act and standards issued pursuant thereto in the facilities in which the contract is to be performed.” (36 F.R. 12475).

the United States." Any records, reports, or information obtained by the Administrator "shall be available to the public," except where trade secrets would be divulged.*

Thus, in response to section 114, the Navy may wish to determine how best to comply with the right of entry and public disclosure requirements without jeopardizing military security.

5. Establishment of Standards

a. Ambient Air Quality Standards

Sections 109 and 110 of the Act respectively require EPA to promulgate and states to implement[†] national primary and secondary ambient air quality standards. As noted above, these standards establish a maximum permissible amount (measured in parts per million (ppm)) of certain pollutants in the open air at any time. The primary standards protect the public health and the secondary standards protect the public welfare, which includes "effects on soils, . . . visibility, . . . economic values, and . . . personal comfort and well-being."⁴ Thus, for carbon monoxide, an ambient air standard of 0.03 ppm may be sufficient to protect the public health but a stricter standard of 0.02 ppm may be required to protect the public welfare.

At this writing EPA has promulgated primary and secondary ambient standards for carbon monoxide, sulfur oxides, particulate matter, hydrocarbons, photochemical oxidants, and nitrogen oxides.^{††} The standard-setting procedure should soon begin for lead, odors, fluorides, and polynuclear organics. Each state has 9 months from the date EPA promulgates the standards to submit to EPA for approval plans which set out in detail how the state intends to achieve and maintain the standards in the required time. EPA must approve or disapprove the plans within four months of the date of submission. The plans must achieve primary standards within three years of EPA approval and secondary standards within a "reasonable time." Limited exemptions are permitted. To meet these deadlines the states are authorized to require emission limitations for sources of air pollution, transportation controls, land use policy, or any other methods necessary to meet the national standards.

The timetable for promulgating and implementing national ambient standards for those pollutants which endanger the public health or welfare is set forth on the following page, as are the limited extensions and exemptions. While listing (which is the initial step in the standard-setting procedure) could occur at any time, this timetable arbitrarily assumes source categories are listed on 30 Jan. 1972. This timetable and all others in this paper further assume that EPA uses all the time it is given.

*The underscored words above indicate that Sec. 114 is applicable to military installations. However, one might argue that the trade secrets exception implies that Sec. 114 is applicable only to industry. For a case particularly relevant to right of entry to military installations, see *Cafeteria Workers v. McElroy*, 387 U.S. 886 (1961).

[†]In February 1972, the Senate Subcommittee on Air and Water Pollution held hearings with respect to the Clean Air Act Amendments of 1970. One of the controversial issues, despite the clear language of Sec. 116, was a state's right to establish in its implementation plan ambient air quality standards stricter than the federal ambient standards. Montana's Board of Health tried to set stricter sulfur oxide standards this way. The copper industry and the Governor (by not signing the implementation plan) protested. The plan eventually submitted by the Governor was found inadequate by EPA. (37 F.R. 10842, 31 May 1972).

^{††}The standards are set forth in 36 F.R. 8186 (30 Apr. 1971). These pollutants had been listed and criteria had been issued before the enactment of the 1970 Amendments to the Clean Air Act (30 Dec. 1970). On 18 Feb. 1972, the D.C. Circuit Court, responding to a suit by the Kennecott Copper Co. challenging the sulfur oxide standards, required EPA "to supply an implementing statement that will enlighten the court as to the basis on which the standard [was reached]." *Kennecott Copper v. EPA* (D.C. Cir. 18 Feb. 1972), 3 ERC 1682, 1685.

Timetable for Ambient Standards and Plans

| <u>Action</u> | <u>Time Ceiling</u> |
|---|---|
| (a) Administrator publishes [and shall from time to time thereafter revise] <i>list</i> of pollutants for which criteria are to be issued. An air pollutant is listed if (a) it has an adverse effect on public health or welfare and (b) it results from numerous or diverse mobile or stationary sources. | 30 Jan. 1972 |
| (b) Administrator issues <i>criteria</i> . Criteria primarily set forth the effects of the pollutant on public health and welfare and variable factors which may alter such effects. Information on control techniques is also issued at this time. | 30 Jan. 1973 |
| (c) Administrator issues <i>proposed</i> primary and secondary ambient standards. | 30 Jan. 1973 |
| (d) Written comments submitted on proposed national ambient standards. | (no date specified) |
| (e) Administrator <i>promulgates</i> primary and secondary ambient standards. | 30 Apr. 1973 |
| (f) States hold public hearings on plans to implement national ambient standards. | (no date specified) |
| (g) Submission of state plans for <i>implementing</i> primary and secondary standards. | 30 Jan. 1974 (Administrator may postpone submission of plan for secondary standards to 30 July 1975) |
| (h) Governors may seek 2-year extension of time for compliance with primary standards. | 30 Jan. 1974 |
| (i) Governors may seek 1-year postponement of time for compliance with primary or secondary standards. | Before 30 May 1977 (primary); within a "reasonable time" (secondary) |
| (j) President may grant renewable 1-year exemption. | Anytime |
| (k) Administrator approves or disapproves state implementation plans. | 30 May 1974 |
| (l) Administrator promulgates substitute implementation plan if state plan not submitted or disapproved. | 30 July 1974 |
| (m) All states must achieve primary standards. | 30 May 1977, or later if (h), (i), or (j) is granted. |
| (n) All states must achieve secondary standards. | Within a "reasonable time" or later if (j) or (k) is granted |

The state plans, if applicable to the Navy, will probably have an impact upon Naval operations. For example, the plans of California, Florida, Guam, Hawaii, and Virginia generally (1) establish deadlines – some as early as June 1972, by which incinerators, steam generators, smoke emission, and other new and existing sources of air pollution must meet specified emission standards and (2) require persons who wish to construct or continue to operate sources which may emit air pollutants (a) to register such sources with the Board of Health and (b) to apply for a permit to construct or operate such sources from the Board of Health.

It is suggested that, as soon as possible, (1) a technical analysis of the effect of the 5 plans upon Naval operations be initiated and (2) if necessary, that further action be taken, such as requesting the Naval districts for states and territories in which the Navy has significant operations to closely evaluate the applicable plan. Since EPA has decided to approve most parts of each jurisdiction's plan,* since many plans' compliance deadlines fall in the early summer, since states have shown an increasing tendency to bring environmental lawsuits against the Navy, and since the Clean Air Act authorizes any citizen to sue the Navy if it violates an emission standard required by a plan, it is recommended that the technical evaluation of the 5 plans begin immediately.

Because of possible adverse publicity it is probably not advisable to the Navy to seek an exemption from compliance with an EPA-approved state implementation plan. Nevertheless, it is possible that a state plan could affect Naval operations to such an extent that an exemption would be advisable. The following exemptions, which are noted in the timetable above, are available:

(1) Section 118: At any time the Navy could request the President to grant a renewable 1-year exemption. Such exemption would be granted if the President determines it to be in the "paramount interest" of the United States to do so. However, this exemption must be annually justified before Congress.

(2) Section 110(e): The Navy could request the state's Governor to seek from EPA a 2-year postponement of the time for meeting EPA's primary ambient standard. Such exemption must be sought when the implementation plans are due and would be granted only if it were technologically impossible to achieve the standard and if alternative means of achieving the standards were not available.

(3) Section 110(f): The Navy could request the state's Governor to seek a 1-year postponement from the date of compliance with primary and secondary ambient standards. Such postponement must be sought prior to the date of compliance and will be granted only if (a) good faith efforts at compliance have been made and (b) necessary technology is not available and (c) alternative control measures will reduce the impact of the source on the public health and (d) the source is essential to national security, public health, or welfare. The Act does not mention subsequent extensions.

*EPA's full approval of 14 plans and partial approval of 41 plans is set forth in 37 F.R. 10842, 31 May 1972. A preliminary injunction was issued on 30 May 1972 by the D.C. district court, prohibiting EPA approval of any state implementation plan that would allow degradation of existing air quality. The Environment Reporter, "Current Developments," B.N.A. Inc., 2 Jun. 1972, p. 123.

b. Source Emission Standards

1. National Emission Standards for New Stationary Sources of Air Pollution (Sec. 111)

Section 111 requires EPA to promulgate national standards of performance* for any new† stationary‡ source of air pollution which "may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare."⁵ The procedure and timetable for promulgation of standards is as follows. While listing (which is the initial step in the standard-setting procedure) could occur at any time, this timetable arbitrarily assumes source categories are listed on 30 Jan. 1972.

- | | |
|--|-------------------|
| (a) Administrator issues a list of categories (which shall from time to time thereafter be revised) of new stationary sources. | 30 Jan. 1972 |
| (b) Administrator publishes <i>proposed standards</i> for emissions from new stationary sources within listed categories. | 30 May 1972 |
| (c) Written comments submitted on proposed new stationary source standards. | No date specified |
| (d) Administrator <i>promulgates emission standards</i> for emissions from new stationary sources within listed categories; date by which <i>new sources must be in compliance</i> . | 30 Aug. 1972 |

It should be noted that no exemptions whatsoever are permitted -- not even from the President. The applicability of this section to the Navy, previously examined in the appendix to section 1, is clearly stated in section 111(b)(4), which states: "The provisions of this section shall apply to any new source owned or operated by the United States."

At this writing the Administrator has promulgated standards of performance for 5 sources of air pollution: incinerators of more than 50 tons/day cladding rate (municipal type refuse), fossil-fuel steam-generators of more than 250 million B.t.u./hour heat input, portland-cement plants, nitric-acid plants, and contact-sulphuric acid plants.⁶ Any of these sources which are constructed or modified after 17 Aug. 1971 must meet EPA's standards.

Since the Navy is permitted no exemptions whatsoever and since any citizen may seek a court injunction against a Navy source which fails to meet the EPA standard, it seems advisable for affected Navy sources (such as bases constructing or modifying large incinerators and fossil-fuel steam-generators) to comply with these standards immediately. Furthermore, it seems advisable to

*"The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated." Sec. 111(a)(1).

†"The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such a source." Sec. 111(a)(2). "The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." Sec. 111(a)(4).

‡"The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant." Sec. 111(a)(3).

ensure that additional new source standards do not impinge upon Naval operations, by making effective input to EPA between the time the standards are proposed and the time they are promulgated. Because new sources must meet the standards the day they are promulgated, keeping abreast of changes in the proposed standards is particularly important.

2. State Emission Standards for *Existing* Stationary Sources of Air Pollution (Sec. 111(d))

Section 111(d) requires the Administrator to establish a procedure by which *states* must submit, for EPA approval or modification, emission standards for *existing* stationary sources of air pollution. Existing sources are sources for which air quality criteria have not been issued but which would be issued were the source a new source.

At this point it is important to take note of a provision of Executive Order 11507. Section II (c) of this order requires *existing* federal facilities by 31 Dec. 1972 to at least "be underway" toward meeting emission standards which would apply if they were new sources. Because of Executive Order 11507, existing incinerators and fossil-fuel steam-generators must "be underway" toward meeting the new source standards⁷ by 31 Dec. 1972.*

The state standards for existing sources have the potential to affect Naval operations to a greater extent than does the Executive Order in that the state standards could require substantial modification, by a specified date, of existing Naval facilities which contribute to air pollution. In view of this possibility, and since the Act sets no date by which these standards must be promulgated, it seems advisable to keep an eye on EPA to ensure that the Administrator does not approve standards which impinge upon Naval operations.

3. National Emission Standards for Stationary Sources Emitting Hazardous Air Pollutants (Sec. 112)

The Administrator is required to promulgate national emission standards for hazardous air pollutants which must be met by sources of such pollutants. A hazardous air pollutant is defined as:

an air pollutant to which no ambient air quality standard is applicable and which in the judgment of the Administrator may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness. [Sec. 112(a)(1)]

The procedure the Administrator must follow before he promulgates a standard is as follows. While listing (which is the initial step in the standard-setting procedure) could occur at any time, this timetable arbitrarily assumes a hazardous pollutant is listed on 30 Jan. 1972:

- (a) Administrator publishes (and shall from time to time thereafter 30 Jan. 1972 reissue) a *list* of hazardous air pollutants.

*An argument can be made that Executive Order 11507, because it was issued before the 1970 amendments to the Clean Air Act became law, does not require existing sources to meet the new source standards of amended Sec. 111. However, such an argument may not be welcomed by an Administration which claims to be environmentally conscious.

- | | |
|--|--------------------------------|
| (b) Administrator publishes <i>proposed emission standards</i> for listed hazardous air pollutants. | 30 July 1972 |
| (c) Administrator holds <i>public hearings</i> on proposed emission standards. | 30 Aug. 1972 |
| (d) Administrator <i>prescribes</i> (promulgates) <i>emission standards</i> for listed hazardous air pollutants. | 30 Jan. 1973 |
| (e) <i>New sources must be in compliance</i> with hazardous air pollutant emission standards. | At discretion of Administrator |
| (f) <i>Existing sources must be in compliance</i> with hazardous air pollutant emission standards. | 30 Apr. 1973 |

The language of the Act appears to make the Administrator's judgment as to applicability a prerequisite to EPA or citizen enforcement of the prescribed standards against new and modified sources.* Subsection 112(b)(2)(c)(1) provides in pertinent part: "After the effective date of any emission standard under this section - (A) no person may construct any new source or modify any existing source *which, in the Administrator's judgment, will emit an air pollutant to which such standard applies. . .*" If the Administrator were to state that a new or modified source is emitting an air pollutant to which a prescribed standard applies, a 2-year renewable exemption is available from the President "if he finds that the technology to implement the standards is not available *and* the operation of such source is required for reasons of national security."⁸

A statement of applicability does not seem to be a prerequisite to enforcement against existing sources, because the Administrator is authorized to grant a two-year exemption for such sources. The two-year Administrator exemption may be granted "if he finds that such period is necessary for the installation of controls"⁹ and that people will be protected from imminent endangerment in the interim. This authorization would not be necessary if the compliance date for existing sources were to hinge on the Administrator's judgment as to applicability (see italicized words above). Thus, it appears that any citizen may, 90 days after the standards are prescribed, enforce such standards against existing sources.

At this writing no standards have been prescribed for hazardous air pollutants. However, standards have been *proposed* for asbestos, mercury and beryllium.¹⁰ Final standards will soon be promulgated.[†] Among other uses, the Navy uses asbestos for piping insulation and fireboxes, mercury for electrical switches, and beryllium for spark resistant tools. Since existing sources must comply 90 days after the standards are prescribed, and since violation of such standards subjects the Navy to suit by any concerned citizen, it seems advisable for the Navy to determine whether it is meeting the proposed standards and whether input should be made to EPA seeking different final standards. Furthermore, since EPA has authority to set standards for other hazardous air pollutants, it seems advisable to keep an eye on EPA to see that such standards do not constrain Naval operations.

*The term "new source" means "a stationary source the construction or modification of which is commenced after the Administrator proposes regulations under this section establishing an emission standard which will be applicable to such source." (Sec. 112(a)(2); emphasis added). The terms "stationary source" and "modification" have the same meaning as they had in Sec. 111(a).

†The final standards should have been prescribed by 7 Jun. 1972. A citizen could sue the Administrator for his failure to perform this non-discretionary duty. See analysis of Sec. 304(a)(2).

4. National Automobile (Mobile Source) Emission Standards

On January 1, 1971, standards were set for new automobiles. These standards require a 90% reduction of hydrocarbon and carbon monoxide emission from 1970 levels for 1975 vehicles and a 90% reduction of nitrogen oxide from 1970 levels for 1976 vehicles. These standards will affect Naval operations only because the clean automobiles will be more expensive than their polluting predecessors.

5. National Aircraft (Mobile Source) Engine and Fuel Emission Standards (Sec. 231-233)

Section 231 of the Act requires the Administrator to issue "emission standards *applicable to emissions of any air pollutant from any class or classes of aircraft engines* which in his judgment cause or contribute to or are likely to cause or contribute to air pollution which endangers the public health or welfare."¹¹ The underscored phrase suggests that the Administrator has authority to issue emission standards for military aircraft engines. Whether or not he will do so is a matter of conjecture which should soon be resolved (see below).

The Act requires the Administrator to adhere to the following procedures in establishing aircraft engine emission standards.

- | | |
|--|--------------|
| (a) Administrator <i>commences a study</i> and investigation of emissions of air pollutants from aircraft. | 31 Mar. 1971 |
| (b) Administrator publishes a report of aircraft emission study and issues <i>proposed emission standards</i> . | 30 Sep. 1971 |
| (c) Administrator holds <i>public hearings</i> with respect to proposed emission standards. | 30 Nov. 1971 |
| (d) Administrator issues <i>final emission regulations</i> which may be revised from time to time. (Enforceable by procedure which must be established by Secretary of Transportation in consultation with Administrator.) | 31 Dec. 1971 |

EPA has not met the above timetable. The proposed standards, due 30 Sep. 1971, have not been issued. At this writing they are being reviewed by the Office of Management and Budget for the second time.*

At this point it is important to note that the Clean Air Act amended section 601 of the Federal Aviation Act, 49 U.S.C. 1421, by requiring the Administrator to prescribe standards for aircraft fuel and fuel additives in order to reduce air pollution. However, the provisions of the Federal Aviation Act are probably not applicable to military aircraft.[†] Section 601 as amended reads in pertinent part:

*A citizen could sue the Administrator for his failure to perform the non-discretionary duties of proposing aircraft emission standards by 30 Sep. 1970 and issuing final standards by 31 Dec. 1971. See Sec. 304(a)(2).

[†]See subsection V(A) of this paper.

(d) The Administrator shall prescribe, and from time to time revise, regulations (1) establishing standards governing the composition or the chemical or physical properties of any aircraft fuel or fuel additive for the purpose of controlling or eliminating aircraft emissions which the Administrator of the Environmental Protection Agency (pursuant to section 231 of the Clean Air Act) determines endanger the public health or welfare, and (2) providing for the implementation and enforcement of such standards.

Section 233 prohibits states from setting pollutant emission standards which are stricter than those set by EPA. Specifically, section 233 provides:

No State or political subdivision thereof may adopt or attempt to enforce any standard respecting emissions of any air pollutant from any aircraft or engine thereof unless such standard is identical to a standard applicable to such aircraft under this part.

As noted above, it is not clear whether EPA's aircraft *engine* emission standards will be applicable to military aircraft. Publication of the proposed standards will probably answer this question. If the standards apply to military aircraft the Navy would have 3 months to persuade EPA to amend the standards so as not to constrain military aircraft operations.* Should it become necessary the Navy could 1) seek a Presidential paramount interest exemption, which must be annually justified before Congress, or 2) petition EPA to change its final standards (final standards "may be revised from time to time").^{1 2}

While EPA's aircraft *fuel* standards will probably not apply to military aircraft, the remote possibility of such application remains. This possibility might be discussed with EPA.

*It is probable that the standards will not have a significant impact upon naval aircraft operations because most naval aircraft are "cleaner" than non-retrofitted civilian aircraft in that most naval aircraft leave no visible trail of particulate matter.

NOTES

1. See analysis of Sec. 111 beginning on p. 23.
2. See analysis of Sec. 112 beginning on p. 24.
3. Executive Order 11602, "Providing for Administration of the Clean Air Act with Respect to Federal Contracts, Grants, or Loans," 36 F.R. 12475, 1 Jul. 1971.
4. Sec. 302(h).
5. Sec. 111(b)(1)(A).
6. The standards are set forth in 36 F.R. 24876, 23 Dec. 1971.
7. The new source standards are analyzed on p. 23 and are set forth in 36 F.R. 24876, 22 Dec. 1971.
8. Sec. 112(c)(2); emphasis added.
9. Sec. 112(c)(1)(B)(ii).
10. The proposed standards are set forth in 36 F.R. 23239, 7 Dec. 1971.
11. Sec. 231(a)(2); emphasis added.
12. Sec. 231(a)(3).

IV. FEDERAL WATER LEGISLATION

Three pieces of Federal legislation have been enacted to protect the quality of the nation's waters: (1) the Rivers and Harbors Act of 1899 (the Refuse Act),¹ (2) the Oil Pollution Control Act of 1961, as amended (OPCA),² and (3) the Federal Water Pollution Control Act of 1970, as amended (FWPCA).³ Proposed amendments to the FWPCA⁴ and Administration policy statements⁵ suggest that this existing legislation will soon be strengthened. Each of these federal laws, proposed amendments, and policy statements has an impact upon Naval operations.

A. THE RIVERS AND HARBORS ACT OF 1899 (THE REFUSE ACT)

Analysis of section 407* of the Refuse Act and of related court decisions establishes the following points:

1. Naval shore facilities and Naval ships are absolutely prohibited from discharging refuse into non-navigable tributaries of U.S. navigable waters; i.e., no permits may be granted for such discharge.[†] "Refuse" includes any pollutant and "navigable water" includes any water within the 3-mile limit (including interior waters) capable of bearing interstate commerce.^{††}

2. Naval shore facilities (but not Naval ships) are prohibited from discharging refuse into U.S. navigable waters without a permit from the Army Corps of Engineers.**

*Sec. 407, which the Justice Department can enforce by injunction, fine, or imprisonment (Sec. 411), provides in pertinent part:

That it shall not be lawful to throw, discharge or deposit, or cause, suffer, or procure to be thrown, discharged or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . that the Secretary of War [now Secretary of Army], whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful. [Emphasis added.]

[†]This finding is based upon a D.C. District Court decision of 22 Dec. 1971, which is now being appealed, (*Kalur v. Resor*, (D.C.D.C. 1971), 3 ERC 1458). This decision has brought the Administration's permit program (see the second following footnote) to a halt. On 7 Feb. 1972, the Washington Post disclosed (page A1) that the heads of EPA and CEQ have written Congress a letter seeking repeal of the Refuse Act and replacement with a program similar to the Administration's permit program. The House recently passed a bill which would repeal the Refuse Act's permit requirement and substitute a permit system under state control. See subsection IV(D) concerning pending water legislation.

^{††}In the 1966 case of *U.S. v. Standard Oil*, the U.S. Supreme Court stated that Sec. 407 must not be given "a narrow, cramped reading" to defeat its purposes (384 U.S. 224, 226). The Court also stated: "the word 'refuse' includes all foreign substances and pollutants [100-octane aviation gasoline in this case] apart from those 'flowing from streets and sewers and passing therefrom in a liquid state' into the watercourse." (384 U.S. 226).

In the 1940 case of *U.S. v. Appalachian Power Co.*, 311 U.S. 377, the U.S. Supreme Court stated that a waterway which by reasonable improvement can be made available for navigation in interstate commerce is a navigable water of the United States. Hence, any water capable of bearing interstate commerce is a navigable water.

**In *Zabel v. Tabb* (5th Cir. 1970), 1 ER 1449, cert. den. 401 U.S. 910 (22 Feb. 1971), it was held that NEPA required the Chief of Engineers to consider ecological factors in evaluating permit applications for discharge of refuse. This decision largely prompted Executive Order 11574 (23 Dec. 1970), which selectively enforces the permit requirement of Sec. 407. The exception from the permit requirement granted to naval (and other) ships is not stated in the Refuse Act but is stated in the Army Corps regulations implementing the Administration's permit program (36 F.R. 6564, 6565, 7 Apr. 1971). Hence the exception for Navy ships is of questionable legality.

3. The Army Corps of Engineers is prohibited from issuing any permits for refuse discharge into U.S. navigable waters until it amends its regulations to require it to consider whether an environmental impact statement* must be filed before a discharge permit is granted, even where the discharge for which the permit is sought meets a federally-approved state water quality standard.†

Thus if the Navy continues to comply with the Refuse Act †† by seeking permits for refuse discharge into U.S. navigable waters it is possible (assuming *Kalur v. Resor* is upheld on appeal) that the Corps will decide that an impact statement is required for the discharge in question. If this impact statement fails to meet the rigorous procedural requirements of NEPA it is likely that a citizen would have standing** to seek an injunction§ against the Navy discharge in question until a proper impact statement is filed.

However, if the Navy violates the Refuse Act by not seeking permits for refuse discharges into U.S. navigable waters, the Navy is subject to punishment only at the discretion of the Justice Department.¶ Hence there is no opportunity for a citizen to enjoin the Navy's discharge unless the Navy applies for a permit.

*The National Environmental Policy Act of 1969 (NEPA) requires all federal agencies to file a detailed environmental impact statement for any "action" which "significantly affects" the quality of the human environment unless there is a clear conflict with existing statutory authority. (Detailed analysis of NEPA is presented in section II.)

Assuming the *Kalur* decision is upheld, it appears that both the discharge of refuse and the granting of a permit for such discharge are actions which require an impact statement if they significantly affect environmental quality. Thus, it is possible that the Corps could require an impact statement for a permit for a discharge which the Navy found did *not* require an impact statement.

† This finding is based on *Kalur v. Resor*, discussed in footnote (†) on the preceding page.

†† The Chief of Naval Operations (Op-45) implemented the Administration's permit program in two naval messages: CNO MSG 2720352 of 23 Apr. 1971 and CMNAVMAF MSG R 1120342 of May 1971. As of 23 May 1972 the Navy had filed 132 permit applications. No permits have yet been issued.

**Several citizens have unsuccessfully sought to enforce the Refuse Act by bringing *qui tam* suits. These suits basically argued that since the Refuse Act provides for a mandatory reward to informers, such informers could sue the polluters if the government failed to do so. Further discussion of *qui tam* litigation is set forth in the appendix of this section.

§ Injunctions against military actions represented by procedurally insufficient impact statements must overcome a national security argument. See discussion of this argument on page 11, footnote (††).

¶ Sec. 413 authorizes the Justice Department to enforce the Refuse Act. The courts have historically permitted the Justice Department to use its discretion in deciding whether or not to bring suit against a violator of the Refuse Act. The most recent manifestation of this attitude was in *Bass Anglers v. Scholze Tannery* (E.D. Tenn. 17 May 1971), 2 ERC 1771 in which the Court stated.

The discretion of the Attorney General in choosing whether to prosecute or not to prosecute criminal violations is absolute and mandamus will not lie to control the free exercise of this discretion. [*U.S. v. Cox*, 342 F.2d. 167 (5th Cir. 1965), *Smith v. U.S.* 375 F.2d. 243 (5th Cir. 1967).] (2 ERC 1778).

A reasonable conclusion from the preceding paragraphs would be that the Navy is more likely to hurt itself by obeying the law (obtaining a permit) than it is by disobeying the law (not obtaining a permit) and that this conclusion will hold as long as the Justice Department continues to ignore Naval violation of the Refuse Act. However, such a conclusion should be tempered by the fact that the Justice Department, at least with respect to industry, is beginning to enforce the Act. This new attitude is manifest in an article from the 13 Nov. 1971 issue of *Environmental Action*, which states in part:

After years of frustration in dealing with water polluters, the federal government is beginning to take a hard-line attitude with the most recalcitrant of its corporate foes. Although no policy directive has come down from Washington, a number of aggressive United States Attorneys around the country are beefing up their attacks by filing criminal charges against companies.

At present, the presidents of a woolen company and a ceramics concern in Massachusetts, the manager of a U.S. Steel plant in Chicago, and the president of an automobile cleansing plant in Baltimore are under criminal indictment under the 1899 Refuse Act.

These actions, and others which are emerging in New York and elsewhere, constitute a major change in government policy. In the past, the government has relied upon civil actions which levy only fines against companies. Under criminal actions, both fines and jail sentences can be handed down.

J. J. O'Donnell, president of J. J. O'Donnell Woolens of Grafton, Mass., has received what is believed the first criminal conviction in the U.S. because of his company's pollution. The company has been under investigation since 1962 for discharging soaps and dyes into the Blackstone River. O'Donnell could receive a sentence of up to \$12,500 fine and five years in jail.

Although the Justice Department has not been eager to use criminal actions in water pollution cases, there appears to be a good deal of latitude as to how aggressively each U.S. Attorney can pursue cases. Apparently, criminal charges will be filed more often now, although only in cases of extreme recalcitrance on the part of polluting industries.

In Chicago, Charles M. Kay, manager of U.S. Steel's South Works, will face a federal trial on a criminal count of aiding the discharge of iron oxides and other solid wastes into Lake Michigan in 1969. U.S. Steel, which has battled with various branches of the federal government over pollution recently, stated that it was "astonished" at the criminal indictment of Kay.

In Baltimore, a grand jury handed down a 100-count indictment against James Byrne, President of Baltimore Imported Car Service and Storage, Inc., for dumping cosmoline and kerosene into the city's harbor. The company removes cosmoline, a petroleum residue, from imported autos.

U.S. officials have gradually realized the shortcomings of civil actions in combating water pollution. In the case of large corporations, they say, a fine means little in terms of punishment. For small, marginal companies, a fine merely makes it more difficult for a firm to raise the capital to install pollution control devices. The threat of a jail sentence, however, is more meaningful to company officials. [p. 11].

B. THE OIL POLLUTION CONTROL ACT OF 1961, AS AMENDED

The Oil Pollution Control Act of 1961, as amended, is by law not applicable to the Navy.* Nevertheless the Chief of Naval Operations, in OpNav Instruction 6240.3A, requires the Navy to comply with the OPCA (and the FWPCA) "insofar as the Acts prohibit the discharge of oil and regardless of whether or not the Acts pertain specifically to naval vessels and shore activities." Consequently the provisions of the amended OPCA pertaining to the discharge of oil will now be examined. These provisions generally prohibit the discharge of oil or oily mixture (more than 100 parts per million) within 50 miles of *any* nation's shore.

Section 3 states: "Subject to the provisions of sections 4 and 5, it shall be unlawful for any person to discharge oil or oily mixture[†] from:

- (a) a tanker within any of the prohibited zones.^{††}
- (b) a ship, other than a tanker, within any of the prohibited zones, except when the ship is proceeding to a port not provided with facilities adequate for the reception, without causing undue delay, it may discharge such residues and oily mixture as would remain for disposal if the bulk of the water had been separated from the mixture: *Provided*, such discharge is made as far as practicable from land.
- (c) a ship of twenty thousand tons gross tonnage or more, including a tanker, for which the building contract is placed on or after the effective date of this Act. However, if in the opinion of the master, special circumstances make it neither reasonable nor practicable to retain the oil or oily mixture on board, it may be discharged outside the prohibited zones. The reasons for such discharge shall be reported in accordance with the regulations prescribed by the Secretary [of the Army]."

Section 4 exempts the following from the requirements of Section 3:

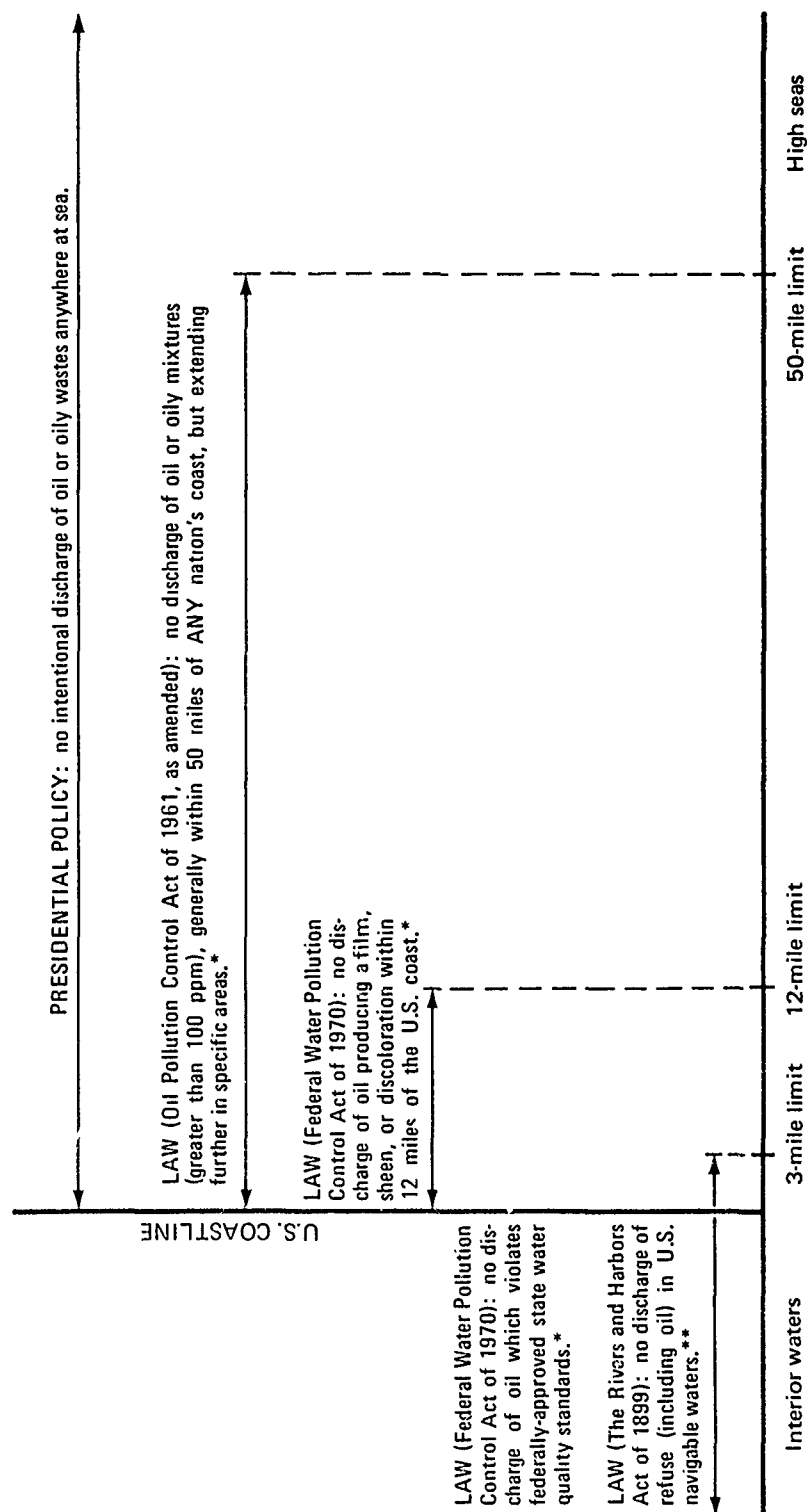
- (a) the discharge of oil or oily mixture from a ship for the purpose of securing the safety of a ship, preventing damage to a ship or cargo, or saving life at sea; or
- (b) the escape of oil, or oily mixture, resulting from damage to a ship or unavoidable leakage, if all reasonable precautions have been taken, after the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimizing the escape;
- (c) the discharge of residue arising from the purification or clarification of fuel oil or lubricating oil: *Provided*, that such discharge is made as far from land as practicable.

Section 5 grants further exemption from the requirements of Section 3. Section 5 states: "Section 3 shall not apply to discharge from the bilges of a ship of an oily mixture containing no oil other than lubricating oil which has drained or leaked from machinery spaces."

*The OPCA of 1961 implemented the original 1954 International Convention for the Prevention of the Pollution of the Sea by Oil, Art. II of which exempted "ships for the time being used as naval auxiliaries." Since the OPCA became law, amendments to the ICPPSO have been ratified and implemented by Public Law 89-551 of 1 Sep. 1966, which amends the OPCA of 1961. Section 2(D)(1) of the amended Act states in pertinent part "The following categories of vessels are excepted from all provisions of the Act ... (iv) naval ships and ships for the time being used as naval auxiliaries."

[†]Section 2(c)(e) of the amended OPCA states "The term 'oil' means crude oil, fuel oil, heavy diesel oil, and lubricating oil, and 'oily' shall be construed accordingly. An 'oily mixture' means a mixture with an oil content of one hundred parts or more in one million parts of mixture."

^{††}Prohibited zones are set forth in section 1011 of the original act. Generally, the prohibited zone extends 50 miles from any nation's coast but in some cases the distance is greater than 50 miles.



*Applicable to the Navy not by law but by OPNAVINST 6240.3A.

**Applicable to the Navy but enforceable only at the discretion of the Justice Department, which thus far has enforced the act against industries but not against government agencies.

FIG. 1: THE SCOPE OF OIL POLLUTION STANDARDS

Figure 1 summarizes oil pollution laws and policy statements which apply to Naval ship and shore facilities. Each of the laws and exceptions to these laws set forth in the chart is examined in detail in this chapter.

C. THE FEDERAL WATER POLLUTION CONTROL ACT OF 1970

This paper will now examine in detail those sections of the Federal Water Pollution Control Act of 1970 which affect Naval operations. Specifically, this paper will examine provisions concerning 1) the applicability to the Navy, 2) relation to the Refuse Act and the OPCA, 3) enforcement, 4) federally-approved state water quality standards, 5) oil discharge, and 6) vessel sewage discharge.

1. Applicability to Navy (Sec. 21(a))

Section 21(a) of the FWPCA requires each federal "facility" to comply with "applicable water quality standards" unless the President grants a "paramount interest" exemption. Section 21(a) states in pertinent part:

Each Federal agency (which term is [sic] used in this section includes Federal departments, agencies, and instrumentalities) having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind, shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this Act in the administration of such property facility, or activity. (Emphasis added.)

What is a federal facility? This question is not answered in the Act but is answered in Executive Order 11507⁶ which was enacted before the FWPCA became law. Section 2(c) of the Order defines "facilities" as including "buildings . . . aircraft, vessels, and other vehicles and property, owned or constructed or manufactured for the purpose of leasing to the Federal Government." Sections 4(a)(1) and 2(d) of the Order require that such facilities "conform to . . . water quality standards adopted pursuant to . . . the Federal Water Pollution Control Act, as amended [i.e., with applicable water quality standards]."

Thus the President requires Naval ships and shore bases to comply with applicable water quality standards. But what are applicable water quality standards? While a definitive answer to this question is beyond the scope of this paper, observations in this regard are made in the appendix to section I. It is noted in this appendix that the term "applicable water quality standards" does not clearly state the extent to which the Navy must comply with state and local water legislation. This does not affect the analysis of the FWPCA's impact on Naval operations. This is because most of the sections of the FWPCA which influence Naval operations do so by requiring *federal* standards (e.g., for oil discharge and for shipboard sewage treatment devices).

2. Relation to Refuse Act and Oil Pollution Control Act (Sec. 24)

Section 24 of the FWPCA clearly states that the FWPCA does not supersede or limit the provisions of the Refuse Act or the Oil Pollution Control Act. Section 24 provides, in pertinent part:

This Act shall not be construed as . . . (2) affecting or impairing the provisions of Sections 13 through 17 of the Act entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors and for other purposes," approved March 3, 1899, as amended [The Refuse Act], or (3) affecting or impairing the provisions of any treaty of the United States [e.g., the Oil Pollution Control Act, which implemented 1954 International Convention for the Prevention of the Pollution of the Sea by Oil].

The effect of this section is that one is required to obey three acts, each of which establishes a different water pollution standard.* A recent district court decision recognized the problems that such multiple standards may create but did not issue a judicial remedy. In *U.S. v. Maplewood Poultry* (D.C. Me. 10 Jun. 1971), 2 ERC 1646, the court stated:

The Court has great sympathy with the plight of an industry which, while endeavoring to comply with water quality standards approved by the Secretary of the Interior under the FWPCA, is subjected to a criminal prosecution instituted by the Department of Justice under the Rivers and Harbors Act. But it is beyond the power of this court either to repeal an act of Congress or to overrule decisions of the Supreme court. (2 ERC 1648)

This dilemma was recently examined at the appellate level in *U.S. v. Pennsylvania Industrial Chemical Corp.* (3rd Cir. 30 May 1972), 4 ERC 1241, where Refuse Act prosecution for violations occurring before 23 Dec. 1970 was enjoined on grounds of due process.

3. Enforcement

The FWPCA is enforced only at the discretion of EPA and the Justice Department; no citizen suits are permitted.[†] However, both EPA and the Justice Department have been increasingly aggressive enforcers.^{††} Furthermore, an amendment to the FWPCA, which passed the Senate unanimously and which passed the House 387-14 would permit citizen suits.**

4. Federally-Approved State Water Quality Standards (Section 10)

Section 10 requires each state by 30 Jun. 1967 to submit for federal (EPA) approval water quality standards and plans for achieving these standards. Basically, these standards establish the purpose for which each body of water is to be used and set a biochemical oxygen demand (BOD) or coliform level which the plans seek to achieve. Before approving a state standard EPA must ensure that the standard will "protect the public health or welfare, enhance the quality of water, and serve the purposes of this Act."⁷ In addition, the standards must "take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses."⁸

*For example, consider the varying oil discharge standards: the Refuse Act prohibits discharge of oil without a permit within 3 miles of U.S. shores. The FWPCA prohibits oil discharge which creates a "film, sheen, or discoloration" within 12 miles of U.S. shores. The OPCA prohibits discharge of oil or oily mixture (more than 100 parts per million) within 50 miles of any nation's shores.

[†]State enforcement of Sec. 10 may be permissible. See page 36, footnote (*).

^{††}See page 31.

**The proposed amendments to the FWPCA are analyzed in subsection IV(D).

Section 10 establishes two procedures* for enforcing federally-approved state water quality standards: (1) a cumbersome three-step procedure of conference, public hearing and court action, and (2) an effective procedure of 180-day notice followed by court action if compliance is not achieved within the 180-day period.

a. Conference, Public Hearing, Court Action

Only the EPA Administrator may call a conference (which begins the three-step procedure) and he may do so only if he finds a) that water pollution is "endangering the health or welfare of persons in a State other than that in which the discharge or discharges originate is occurring"⁹ or b) "that substantial economic injury results from the inability to market shellfish or shellfish products in interstate commerce."¹⁰ The Administrator can use this "shellfish rule" in cases of intrastate pollution where the State has not requested federal intervention. *No time limit is set for the conference.* When the conference ends, the Administrator, if he believes "that effective progress toward abatement of such pollution is not being made and that the health or welfare of any persons is being endangered,"¹¹ must any time thereafter recommend to the appropriate State agency "that it take the necessary remedial action"¹² within 6 months.

If there has been ineffective or non-existent remedial action, the Administrator must call a public hearing giving at least three weeks' prior notice of such hearing to the State agencies and the alleged polluters. *No time limit is set for the public hearing.* If the Hearing Board finds pollution occurring and ineffective abatement measures, the polluter must secure abatement within a reasonable time (he must be given at least 6 months).

If at the end of this indeterminate period reasonable abatement action is not taken, the Administrator may request suit by the Attorney General, who, as noted above, is, under no obligation to respond. (The written consent of the Governor is required for suits concerning intrastate pollution.)

Thus, the procedure of conference, public hearing, and court action is as time consuming as that of the 1963 Clean Air Act. However, unlike the old Clean Air Act, the FWPCA provides a second and far more effective method of enforcement, which will now be examined.

b. 180-Day Notice, Court Action

The 180-day notice enforcement method provides for the Administrator to give 180 days notice to violators before he requests the Attorney General to bring suit, assuming the Administrator believes (1) "the discharge of matter into such interstate waters or portions thereof . . . reduces the quality of such waters below the water quality standards established under this subsection,"¹³ and (2) that the pollution "is endangering the public health or welfare."¹⁴ As with the three-step enforcement procedure, suit under 180-day notice requires the Governor's written consent if the pollution concerns intrastate waters.

*A third procedure, wherein the state itself enforces its water quality standard, is not enumerated in the Act. However, it seems quite reasonable that a state be permitted to enforce the water quality standard which it created. New Jersey and San Diego apparently agree with this logic and have attempted to enforce their water quality standards against the Navy.

Regardless of which enforcement procedure is utilized, the court is required to give "due consideration to the practicability and to the physical and economic feasibility of securing abatement of any pollution proved ... as the public interest and the equities of the case may require."¹⁵

The preceding paragraphs have illustrated that, assuming the President does not grant a paramount interest exemption, the Navy may be sued for violation of federally-approved state water quality standards if the Administrator follows either the conference, public hearing, court action procedure or the 180-day notice, court action procedure.

More alarming than the possibility of suit by the Administrator is the possibility of suit by the individual state. Most of the state standards and plans do not directly affect Naval operations, in that they rarely require source-emission limitations. This is because states are reluctant to impose such limitations upon high employment, high tax-revenue-producing industries which have the option of relocating in states with weaker standards and plans. However, some state standards, particularly those of California and New Jersey, may affect Naval operations. On 6 Mar. 1972, San Diego issued a cease and desist order against the discharge of oil and sewage from Navy ships in San Diego Bay. It is probable that San Diego will argue that its federally-approved water quality standard requires the court to enforce this order. In November 1971, New Jersey demanded that Lakehurst Naval Station (and eight other federal agencies) immediately comply with New Jersey's federally-approved water quality standard.

Hence, two states have already used their federally-approved water quality standards to influence Naval operations. If the court requires the Navy to comply with state water quality standards and if compliance is impracticable from an operational standpoint, it may be advisable to seek a Presidential paramount interest exemption.

5. Oil Discharge (Section 11)

Section 11(a) states that it is the policy of the United States to cease oil discharge within 12 miles of shore, (b) prohibits oil discharge within 12 miles of shore in violation of regulations promulgated 11 Sep. 1970 [which prohibit discharge causing a film sheen, or discoloration in water, or violating federally-approved state water quality standards (which are weaker than the film, sheen, discoloration standard), subject to the exceptions enumerated in the Oil Pollution Control Act of 1961], (c) imposes a fine upon anyone who knows of a violation of (b) and fails to report it, and (d) requires that the removal of oil and actions to minimize damage from oil discharge shall, to the greatest extent possible, be in accordance with the National Contingency Plan of 20 Aug. 1971. Before embarking upon an analysis of these subsections of section 11, it is important to remember that OpNav Instruction 6240.3A requires the Navy to comply with the FWPCA (and the OPCA) even though these Acts are not applicable to Naval vessels:

The Navy will conform to provisions of the Oil Pollution Control Act, 1961, as amended, Federal Water Pollution Control Act, as amended, insofar as the Acts prohibit the discharge of oil, and regardless of whether or not the Acts pertain specifically to naval vessels and shore activities. The intent of this policy is to prohibit the discharge of all oil and oily mixtures in all areas except when operational emergencies exist.

a. Congressional Policy Statement*

Section 11(b)(1) states: "The Congress hereby declares it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." The term "navigable waters" usually includes interior waters and waters within 3 miles of shore which are capable of bearing interstate commerce. The contiguous zone includes waters within 12 miles of shore.

b. The President's Oil Discharge Regulations

Sections 11(b)(2) and 11(b)(3) prohibit oil discharge in violation of regulations promulgated by the President. The language of Section 11(b)(2) and Section 11(b)(3) is as follows:

Sec. 11(b)(2) The discharge of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone in harmful quantities as determined by the President under paragraph (3) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone, where permitted under article IV of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, as amended,^[†] and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

Sec. 11(b)(3) The President shall by regulation, to be issued as soon as possible after the date of enactment of this paragraph, determine for the purposes of this section, those quantities of oil the discharge of which, at such times, locations, circumstances, and conditions, will be harmful to the public health or welfare of the United States, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches except that in the case of the discharge of oil into or upon the waters of the contiguous zone, only those discharges which threaten the fishery resources of the contiguous zone or threaten to pollute or contribute to the pollution of the territory or the territorial sea of the United States may be determined to be harmful.

The President issued his oil discharge regulations on 11 Sep. 1970.¹⁶ Navy vessels are public vessels and are thus excluded by section 610.1(c) of the regulations, which states (emphasis added): "Vessel" means every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water *other than a public vessel*." Shore facilities are not excluded. However, OpNav Instruction 6240.3A requires the Navy to comply with the regulations regardless of this exemption. The regulations prohibit oil discharges which:

- (a) violate applicable water quality standards [defined as federally-approved state water quality standards under section 10], or
- (b) cause a film or sheen upon or discoloration of the surface of the water or adjoining shore lines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shore lines.

*Two other policy statements pertaining to oil discharge, which have significant implications for naval operations, are examined on page 43.

[†]The permitted discharges under this Convention are set forth in the analysis of the Oil Pollution Control Act of 1961.

In addition to the exceptions specified in the Oil Pollution Control Act, an exemption from the President's regulations is also granted to "discharges of oil from a properly functioning vessel engine."¹⁷ However, "such oil accumulated in a vessel's bilges shall not be so exempt."¹⁸

c. Penalty for Failure to Report Violation of President's Regulations

Section 11(b)(4) states that anyone who fails to report an observed violation of the President's regulations to the Coast Guard shall, upon conviction, be either fined or imprisoned, unless the President grants a paramount interest exemption. Prosecution, of course, is presently at the discretion of the Justice Department. Because "vessels" excludes public vessels, the Navy is bound only through OpNav Instruction 6240.3A.

Sec. 11(b)(4) Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil from such vessel or facility in violation of paragraph (2) of this subsection, immediately notify the appropriate agency of the United States Government [the Coast Guard] of such discharge. Any such person who fails to notify immediately such agency of such discharge shall, upon conviction, be fined not more than \$10,000, or imprisoned for not more than one year or both. Notification received pursuant to this paragraph or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

d. National Contingency Plan for Oil Spills

Section 11(c)(2) requires the President to prepare and publish a National Contingency Plan which "shall provide for efficient, coordinated and effective action to minimize damage from oil discharges, including containment, dispersal, and removal of oil." This plan was published in the Federal Register on 20 Aug. 1971.¹⁹ Section 11(c)(2) further provides that "the removal of oil and actions to minimize damage from oil discharges shall, to the greatest extent possible be in accordance with the National Contingency Plan."²⁰

Four sections of this plan are of interest to the Navy but are of such detail that they cannot be examined here: (1) section 402.1, which suggests containment measures, (2) section 403.1, which suggests cleanup measures, (3) section 404.1, which suggests restoration measures, and (4) Annex X, which advocates mechanical removal and proper disposal of spilled oil and which sets forth a schedule for dispersants and other chemicals used to treat spills.

The only exemption from Navy compliance "to the greatest extent possible" with this plan is a Presidential paramount interest exemption. Such an exemption is unlikely in view of OpNav Instruction 6240.3A.

6. Sewage Discharge from Vessels (Section 13)

Section 13 attempts to control discharge of sewage from vessels by requiring the Administrator of EPA, as soon as possible, to promulgate standards of performance for marine sanitation devices on ships operating in U.S. navigable waters. These standards will be effective for new vessels 2 years after implementation and will be effective for existing vessels 5 years after implementation.

These standards must be designed to prevent the discharge into or upon U.S. navigable waters of untreated or inadequately treated sewage from new and existing vessels. The Administrator must give appropriate consideration to the economic costs involved and must ensure that the standards are within the limits of available technology. At this writing only the proposed standards have been issued.*²¹ These proposed standards demand the equivalent of secondary treatment. Specifically, the proposed standards state:

- a) A marine sanitation device which will prevent the discharge of untreated or inadequately treated sewage, and which will be required under these standards, is one which will prevent the discharge of an effluent containing visible floating or settleable solids; and from which the effluent, without dilution other than that normally used for flushing purposes, does not contain:
 - (1) Total coliform bacteria in excess of 240 per 100 ml.;
 - (2) Biochemical Oxygen Demand in excess of 100 mg./l; and,
 - (3) Suspended solids in excess of 150 mg./l.

Congress' reluctance to require mobile sources of water pollution to comply with varying and often-changing state standards is manifest in section 13(f), which prohibits states from setting vessel sewage standards after the uniform federal standards have been promulgated. Section 13(f) provides: "After the effective date of the initial standards and regulations promulgated under this section, no state or political subdivision thereof shall adopt or enforce any statute or regulation . . . with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the provisions of this section."[†]

Congress seems to have recognized the serious potential effect of the federal sewage standards upon Naval operations for it has permitted the Navy three exemptions. First, the President may exempt or postpone applicability to the Navy if he feels it is "consistent with the paramount interest of the United States" to do so. Second, "the Secretary of the department in which the Coast Guard is operating [Department of Transportation] . . . may waive applicability of standards and regulations as necessary or appropriate for . . . classes, types, and sizes of vessels . . . and, upon application, for individual vessels."²³ Third, "The provisions of this section and the standards and regulations promulgated hereunder apply to vessels owned and operated by the United States unless the Secretary of Defense finds that compliance would not be in the interest of national security."²⁴

Hopefully the Navy will not need an exemption. This is because the Administrator, in establishing the sewage standards, must give "appropriate consideration to the economic costs involved."²⁵ This criterion should persuade the Administrator *not* to impose a no-discharge

*EPA's final standards, issued 20 Jun. 1972, are described in the second author's note on page xiii.

[†]The recent case of *Aiple Towing v. Voight* (W.D. Wisc. 5 Apr. 1971), 2 ERC 1690, held that until the federal sewage standards are promulgated, state sewage regulation is permissible. The court felt that Sec. 13 gives boat owners plenty of time to comply with differing federal standards.

Plaintiffs suggest that it would be unreasonable to decide that the states have been left free to impose certain requirements on boat owners for a relatively brief time, when the Secretary's [EPA Administrator's] requirements are promulgated in near future may then differ and may demand new and expensive changes. However, this suggestion is undercut to a degree by the provision that a boat owner who is complying with applicable state regulations will enjoy five years within which to comply with inconsistent federal standards. (2 ERC 1691, 1692).

standard upon sewage from Navy ships in U.S. navigable waters. To impose such a policy upon the Navy would achieve very little abatement at very high cost. Specifically, it will cost about \$750 million in investment costs alone to modify ships and piers for discharge to shore facilities, which is probably the least costly method of complying with a no-discharge policy.* Given a finite number of tax dollars for pollution abatement such a policy seems counter-productive in that it will cost only \$2.3 million to stop sewage discharge from the Georgetown sewer gap, which is roughly equivalent to that from Navy ships in U.S. ports.† In other words, it seems sensible to use the dollars required to terminate Navy discharge for elimination of many local sewage problems similar to those of the Georgetown gap. Such a policy would "give appropriate consideration to the economic costs involved."

D. PENDING FEDERAL WATER LEGISLATION

At this writing a Senate bill (S. 2770) and a House bill (H.R. 11896) to amend the Federal Water Pollution Control Act of 1970 are pending on Capitol Hill. Each would make significant changes in the Act. The bills reflect dissatisfaction with the existing Act's method of abating water pollution through enforcement (180-day notice) of federally-approved state water quality standards. As a result, each bill retains this enforcement procedure but also requires that EPA promulgate effluent standards for sources of water pollution. This is the most noticeable of several significant amendments to the Act. The Senate bill, which the Senate passed unanimously on 2 Nov. 1971, is much stronger than the House bill, which was passed by the House 387-14 on 29 Mar. 1972. Any differences between the Senate bill and the House bill will be resolved in a House-Senate conference (as of 12 Jun. 1972 the conference was in its 6th week of meetings) which will submit a conference report to the floor of the House and the Senate for approval. This paper now examines provisions in these bills which could affect Naval operations.

1. Navy Applicability More Certain

Both bills contain identical amendments to Sec. 21(a) of the FWPCA. Specifically, Sec. 313 of both bills states:

Each . . . agency . . . of the Federal Government . . . *shall comply with Federal, State, interstate, and local requirements* respecting control and abatement of pollution . . . [subject to limited Presidential exemption; emphasis added].

The underscored language replaces the phrase "shall comply with applicable water quality standards." As noted in the appendix to section I, this new language is probably a more explicit statement of Congressional intent to waive the Navy's immunity from state and local regulation than is the existing language. It may be advisable to notify Congress of the potential implications of the new language before the bills become law.

*See "Cost Analysis of Optional Methods of Shipboard Domestic Waste Disposal," Cdr. C. Piersall, Mr. R. Borgstrom, and Mr. R. Marshall, (NATE)11-71, (INS)271.10, 7 Dec. 1971. An expanded discussion is presented in Piersall and Borgstrom, "Cost Analysis of Optional Methods of Shipboard Domestic Waste Disposal," CNA Professional Paper 91, Jan. 1972.

†See "Comparison of Domestic Waste Discharge from the Georgetown Sewer Gap with U.S. Navy Ships in U.S. Ports," J. W. Wilmer, Jr. (NATE)16-71, 13 Dec 1971.

2. Refuse Act Weakened

Each bill would place the Refuse Act permit program under the FWPCA and, in so doing, would increase the likelihood of citizen enforcement of the permit program against the Navy. As indicated in (5) below, each bill would amend the FWPCA to permit citizen suits against any person "alleged to be in violation of (A) an emission standard or limitation under this Act." The Senate bill would have EPA issue the permits while the House bill would have the states issue the permits. Thus citizen enforcement of the Senate's EPA-issued permits is probable while citizen enforcement of the House's state-issued permits is possible only if the standards required by state permits are considered to be "under this Act."

One additional aspect of the House bill should be noted: it would require the Navy to adhere to permit programs which may vary substantially among the several states. The Senate bill would be more likely to produce uniform standards by requiring EPA to issue the permits.

3. Fewer NEPA Impact Statements Required

Section 511 of both bills seeks to amend the National Environmental Policy Act in an effort to ameliorate the administrative difficulties (and oft-resultant court injunctions) faced by federal agencies whose actions oblige them to file environmental impact statements. Both bills state that "as to water quality considerations" NEPA shall be satisfied if the federal activity is done pursuant to a (Refuse Act or FWPCA) permit. The Senate bill would utilize this new procedure only in cases involving "the construction of any activity *which may result in any discharge into the navigable waters of the United States.*" The House bill, in an apparent reaction to *Kalur v. Resor*, does not contain the italicized limitation.

4. Pretreatment Standards

Section 307 of both bills requires EPA to establish standards for pretreatment of pollutants before they enter a public treatment system. Specifically, EPA must publish:

... regulations establishing pretreatment standards for (introduction) (discharges) of pollutants into treatment works ... which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. [The House bill uses "introduction," the Senate bill uses "discharges."]

Thus Navy ship or shore sewage which contains such oily wastes or is of such volume or acidity that it "would interfere" with the municipal treatment systems must be pretreated according to EPA's regulations. It would seem advisable to harmonize this amendment with any attempt to tailor Naval sewage-discharge procedure to a possible "no-discharge" standard (under section 13 of the existing FWPCA).

5. Citizen Suits Authorized

The final significant feature of these bills is that each, in different language, authorizes citizens to bring suit against any person "alleged to be in violation of (A) an effluent standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such standard

or limitation." The Senate bill citizen-suit provision is identical to that of the Clean Air Act of 1970. The House bill would limit a citizen's standing to sue by requiring that the citizen be:

(1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

The essential message of these bills for the Navy is that, assuming the FWPCA is applicable to Naval operations, at least some citizens may sue the Navy if it violates any effluent standard promulgated under the FWPCA by EPA or by state permit. If the Senate version becomes law, virtually every citizen and environmental group would be authorized to sue the Navy for violation of the FWPCA.

E. PRESIDENTIAL AND CNO POLICY STATEMENTS ON OIL DISCHARGE

The preceding pages have centered on the impact of existing and proposed water legislation upon Naval operations. The following paragraphs will set forth the Administration's policy statement on oil pollution on the high seas. In considering R&D requirements, policy statements are at least as important as current legislation and standards because such statements may indicate the direction of future legislation and/or executive pressure.

President Nixon, in his 8 Feb. 1971 environmental message to Congress, stated:

In addition, we have taken the initiative in NATO's Committee on the Challenges of Modern Society (CCMS) and achieved wide international support for *terminating all intentional discharges of oil and oily wastes from ships into the oceans by 1975, if possible, and no later than the end of this decade.*²⁶

This statement of Administration policy was foreshadowed by Secretary of Transportation John Volpe's speech before the 2 Nov. 1970 CCMS oil spills conference in Brussels. Specifically, Secretary Volpe stated:

My government proposes that NATO nations resolve to achieve by mid-decade a complete halt to all intentional discharge of oil and oily wastes into the oceans by tankers and other vessels. This is a fundamental and major goal. *It may involve steps such as improved ship design aimed at clean ballast operations and the development of adequate port facilities to receive waste, oily bilge, and ballast waters. This is a major goal and an essential goal - well worthy of the effort required.* There is no doubt that the burden of achieving this goal will require a major effort by U.S. industry, but we believe it can and must be accomplished and that it will have a dramatic effect on the marine environment.²⁷

However, in his 8 Feb. 1972 environmental message to Congress, the President did not mention the 1975-1980 deadline. Specifically, the President stated: "We are preparing for a 1973 Intergovernmental Maritime Consultative Organization (IMCO) Conference to draft a convention barring intentional discharges to the sea of oil and hazardous substances from ships."²⁸ This failure to include a deadline may present an opportunity for the Navy to advise the Administration of when it can meet a no-intentional discharge policy. Perhaps in response to the Administration policy statements, the Chief of Naval Operations, in section 5b of OpNav Instruction 6240.3A, stated:

The Navy will conform to provisions of the Oil Pollution Act, 1961 as amended, and the Federal Water Pollution Control Act, as amended, insofar as the Acts prohibit the discharge of oil, and regardless of whether or not the Acts pertain specifically to naval vessels and shore activities. *The intent of this policy is to prohibit the discharge of all oil and oily mixtures in all areas except when operational emergencies exist.* [Emphasis added.]

F. CONCLUSION

Existing Federal legislation, proposed amendments to this legislation, and Administration and CNO policy statements establish increasingly stringent procedures to abate water pollution. Each of these procedures has an impact upon Naval operations. None can be ignored.

APPENDIX: QUI TAM SUITS UNDER THE REFUSE ACT

Litigation of qui tam suits, which seek citizen enforcement of the Refuse Act, has been uniformly unsuccessful. These suits were based on Sec. 411 of the Act, which requires that anyone giving information leading to conviction shall be awarded one half of the fine. Each suit was brought under the assumption that because the Act provided for a mandatory reward to informers, such informers could sue the polluters if the government failed to do so. This assumption was erroneous. Three recent cases which ruled against qui tam suits under the Refuse Act are: *Jacklovich v. Interlake* (7th Cir. 4 Apr. 1972), 3 ERC 2054, *Guthrie v. Alabama By-Products* (5th Cir. 28 Mar. 1972), 3 ERC 1950, and *Connecticut Action Now v. Roberts Plating* (2nd Cir. 21 Mar. 1972), 3 ERC 1934. Each suit failed because the Refuse Act does not specifically authorize such suits and because criminal statutes (the Refuse Act provides for imprisonment as well as fines) cannot be enforced by civil actions (97 U.S. 146). The proper grounds for a qui tam action are set forth in Black's Law Dictionary, which was quoted in this respect in *Bass Anglers v. Scholze Tannery* (E.D. Tenn. 17 May 1971), 2 ERC 1771:

an action brought by an informer, under a statute which establishes a penalty for the commission or omission of a certain act, and *provides that the same shall be recoverable in a civil action*, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution. (Sec 1773; emphasis added.)

The failure of qui tam actions under the Refuse Act prompted Representative Michael J. Harrington to introduce H.R. 8355, which would amend the Refuse Act to provide individuals a statutory right to sue violators in a qui tam action. Specifically, Sec. 16 of the proposed amendment to the Refuse Act states:

If the United States Attorney does not within 60 days after receiving from any person information concerning the violation, institute and maintain a civil or criminal action against such violation, the person furnishing such information may institute a civil action for such pecuniary penalty against any person subject to said penalty.

If this bill becomes law, the Justice Department would no longer be the sole enforcer of the Refuse Act. Instead, informers could sue the Navy for illegal discharges if the Justice Department did not. However, the chances of this bill passing are remote. The bill is now pending before the House Public Works Committee, which recently reported H.R. 11896 to amend the FWPCA. The Committee apparently dislikes citizen suits and is even more opposed to the Refuse Act. As a result, it is unlikely that the bill will be reported. There is a strong possibility that Rep. Harrington will bring the bill to the floor through a discharge petition, but the possibility that it will be passed under such circumstances is remote.

NOTES

1. 32 U.S.C. 407.
2. 33 U.S.C. 10001.
3. 33 U.S.C. 466.
4. S. 2770 and H.R. 11896.
5. Nixon, President Richard M. "The First Annual Report on the State of the Nation's Environment . . ." *The Congressional Record*, 8 Feb. 1971, and "The Second Annual Report on the State of the Nation's Environment . . ." *The Congressional Record*, 8 Feb. 1972.
6. Executive Order 11507, "Prevention, Control, and Abatement of Air and Water Pollution at Federal Facilities," 35 F.R. 2573, 5 Feb. 1970.
7. Sec. 10(c)(3).
8. Ibid.
9. Sec. 10(d)(1).
10. Ibid.
11. Sec. 10(e).
12. Ibid.
13. Sec. 10(c)(5).
14. Sec. 10(g).
15. Sec. 10(h).
16. 35 F.R. 14306 (11 Sep. 1970).
17. 35 F.R. 14307 (11 Sep. 1970), Sec. 610.6
18. Ibid.
19. 36 F.R. 16215, 20 Aug. 1971.
20. Sec. 11(c)(2); emphasis added.
21. 36 F.R. 8739, 12 May 1971.

22. Sec. 21(a).

23. Sec. 13(c)(2).

24. Sec. 13(d); emphasis added.

25. Sec. 13(b)(1).

26. 117 Cong. Rec. 505, 507 (8 Feb. 1971).

27. "Remarks by Secretary of Transportation John A. Volpe at the Opening Session of the NATO CCMS Oil Spills Conference in Brussels, November 2, 1970," Department of Transportation binder number 64-S-70.

28. 118 Cong. Rec. 1426, 1431 (8 Feb. 1972).

V. FEDERAL NOISE LEGISLATION

Federal noise legislation* is represented by the Aircraft Noise Abatement Act of 1968 (ANAA),¹ the Noise Pollution and Abatement Act of 1970 (NPAA),² the Walsh-Healey Public Contracts Act of 1964,³ and the Occupational Safety and Health Act of 1970 (OSHA).⁴ Following is an analysis of the sections of these acts and of pending federal noise legislation which apply to the Navy.

A. THE AIRCRAFT NOISE ABATEMENT ACT OF 1968

Section 1431(a) of the ANAA provides in part that "the Administrator of the Federal Aviation Administration, . . . shall prescribe and amend standards for the measure of aircraft noise and sonic boom and shall prescribe and amend such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom." These words, by omission, could apply to both civil and military aircraft. The Department of Defense was concerned about this feature of the ANAA before it became law and lobbied unsuccessfully to change the language. In a letter to Congressman Harley O. Staggers, Chairman of the House Committee on Interstate and Foreign Commerce, the Air Force, designated to express the views of DoD, wrote:

The Department of Defense is vitally interested in aircraft noise abatement and is presently conducting research and development related to noise reduction. However, supersonic flight introduces still another noise disturbance -- the sonic boom -- a phenomenon for which no noise suppression system has been devised. The requirement for supersonic equipment and its use on a continuously expanding scale is an absolute military necessity. The provisions of these bills⁵ imply application to any or all aircraft and, being broad in scope, pose a potential threat to the flexibility of ground and air operation of military aircraft."⁶

It is conceded that the Act can be construed to apply to both civil and military aircraft. However, such a construction is unlikely for two reasons. First, the wording of section 1431(b) possibly leaves room for national defense considerations to take precedence over the Act's attempt to provide for the control and abatement of aircraft noise and sonic boom. Specifically, this subsection provides in pertinent part (emphasis added):

In prescribing and amending standards, rules, and regulations under this section, the Administrator shall --

. . . (3) consider whether any proposed standard, rule, or regulation is consistent with . . . air transportation in the public interest;

(4) consider whether any proposed standard, rule, or regulation is economically reasonable, technologically practicable, and *appropriate for the particular type of aircraft*, aircraft engine, appliance, or certificate to which it will apply;

Second, since the Act was passed in July of 1968 every FAA regulation pursuant to the ANAA has applied only to civil aircraft noise abatement.

*Municipalities are becoming increasingly concerned about noise pollution. For instance, the Grand Trunk Western Railroad was recently fined \$5950 for 40 violations of Chicago's noise ordinance. The Environment Reporter, "Current Developments," B.N.A. Inc., 9 Jun. 1972, p. 152.

B. THE NOISE POLLUTION AND ABATEMENT ACT OF 1970

The 1970 NPAA applies to all sources of noise, unlike the 1968 ANAA, which is limited to aircraft noise. Specifically, section 402(2) provides: "the Administrator [of the Environmental Protection Agency] . . . shall carry out . . . a full and complete investigation and study of noise and its effect on the public health and welfare." However, despite its comparative breadth, the 1970 NPAA does not authorize the Administrator to prescribe standards, rules, or regulations. Rather, section 402(2) requires the Administrator to "report . . . his recommendations for legislation or other action, to the President and the Congress." Nevertheless, the 1970 NPAA has the potential for affecting military noise sources. This potential is manifest in section 402(c), which states (emphasis added):

in any case where any Federal department or agency is carrying out or sponsoring *any* activity resulting in noise *which the Administrator determines* amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.

Pursuant to this subsection, EPA has circulated preliminary guidelines, section 2.1 of which states in part:

All Federal agencies and departments shall consult with the Administrator (EPA) regarding any activity . . . whenever . . .

(1) the ongoing or planned activity may generate noise which increases the existing ambient noise environment at any place or at any time.

Lest there be any doubt about the scope of this suggested guideline, section 2.2 provides:

"this requirement applies not only to direct and major actions of agencies, but also to all their activities which may have *any* effect upon the noise environment, including but not limited to the following:

(a) Decisions related to type, kind, deployment and usage of equipment, products, and material owned, leased or supported by the Federal department or agency." [Emphasis added]

A literal reading (or interpretation) of these proposed guidelines would require the Navy to consult with the Administrator every time it fires a shot or operates a jackhammer in an area where such noise level does not already exist. It is advisable that the Navy exert every effort to see that these preliminary and subsequent guidelines do not jeopardize the nation's defense efforts.

C. THE WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1964 AND THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970

Section 35(e) of the Walsh-Healey Public Contracts Act requires that contracts entered into by any federal agency for the manufacture or furnishing of materials, supplies, articles or equipment in any amount exceeding \$10,000 must contain a stipulation that:

no part of such contract shall be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contracts be

manufactured or fabricated in any plants, factories, building, or surroundings *or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract.* Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with the subsection. [Emphasis added.]

The Labor Department acted on this questionable authority to establish standards to protect the occupational health and safety of employees and published standards for occupational noise exposure. The permissible noise exposures, including stricter exposures set forth in pending H.R. 6990, are as follows:⁷

| Duration per day (hours) | Sound level (decibels on A-scale) | |
|-----------------------------|-----------------------------------|-----------|
| | Labor Department | H.R. 6990 |
| 8 | 90 | 80 |
| 6 | 92 | 82 |
| 4 | 95 | 85 |
| 3 | 97 | 87 |
| 2 | 100 | 90 |
| 1½ | 102 | 92 |
| 1 | 105 | 95 |
| ½ | 110 | 100 |
| ¼ or less | 115 | 105 |

Given these permissible exposures, it is interesting to note that the average sound level for a sonar room is 60 dB(A), for an engine room 110 dB(A), and for a carrier flight deck under operating conditions 125 dB(A). These are low estimates.

While the Labor Department's legal authority to set occupational health standards under the Walsh-Healey Act is questionable, the Department is clearly given such authority in the Williams-Steiger Occupational Safety and Health Act of 1970, section 6(a) of which provides in part:

The Secretary [of Labor] shall, as soon as practicable during the period beginning with the effective date of this act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal Standard.

Consequently, on 29 May 1971 the Secretary of Labor stated that every contractor and subcontractor shall comply with the 20 May 1969 standards promulgated under authority of the Walsh-Healey Act. Hence, there is now no doubt that Labor's occupational noise standards must be obeyed by federal contractors.

Thus far occupational noise standards have been examined only in the context of federal contractors. An important question remains: must all federal agencies adhere to the standards promulgated by the Labor Department under the OSHA? The OSHA does not clearly resolve this question. Section 19(a) of the Act provides in pertinent part:

It shall be the responsibility of the head of each Federal agency to establish and maintain an effective and comprehensive occupational safety and health program which is *consistent with* the standards promulgated under Section 6.

Section 4(b)(1) of the Act apparently contradicts this mandate to federal agencies:

Nothing of this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Executive Order 11612, 28 Jul. 1971, attempts to resolve this paradox by requiring each federal agency to "establish an occupational safety and health program . . . consistent [but not necessarily identical] with the standards prescribed by section 6 of the [OSHA]."⁸ Since the sections centering on enforcement and penalties are directed toward employers, and since Sec. 3(5) states that the word employer "does not include the United States," it is clear that the Act may not be enforced against federal agencies.

Thus the Navy must adopt occupational health (e.g., noise) standards consistent with the standards promulgated by the Department of Labor. The Navy has done so through BuMed Instruction 62060.6B. Variance from the Labor standards is permissible under both the OSHA and the Executive Order, but may result in adverse publicity.

D. AIRCRAFT NOISE ABATEMENT VIA THE FIFTH AMENDMENT

Supreme Court decisions upholding the use of the Fifth Amendment to achieve noise abatement are of such importance that this paper will make an exception to its focus on federal legislation. The Fifth Amendment provides in part: "nor shall private property be *taken* for public use, without just compensation" (emphasis added). This provision is binding on the U.S. Government. State, county or municipal authorities are similarly bound under the Fourteenth Amendment. The recurrent legal question is, what constitutes a compensable taking? The landmark case in the area of noise pollution is *United States v. Causby*, 328 U.S. 256 (1946), a case of special interest for Navy pilots. *Causby*, which was brought under the Tucker Act,* held that the United States[†] by *low and frequent* flights of its military planes *over* a chicken farm made the property unusable for that purpose and that therefore there had been a taking, in the constitutional sense, of an air easement for which compensation must be made.

The facts in *Causby* clearly demonstrated a taking of private property for public use. Mr. Causby's property was taken just as if the Government had run a railroad across it or a pipeline under it.⁹ Flights flew low and frequently over his land. The height which he could make his buildings was limited, the glare of airplane lights swept his property at night, and the risk of an airplane crash was ever-present. Because a taking was established, just compensation for damage resulting from aircraft noise was permitted.

*The Tucker Act, 28 U.S.C. 1346(a)(2), provides that an action may be maintained against the United States for a claim "founded . . . upon the Constitution . . . or upon any express or implied contract with the United States . . ." To this extent the Act waives sovereign immunity.

[†]The *Causby* doctrine was extended to the local level in *Griggs v. Allegheny County*, 369 U.S. 84 (1962), which held that the County, which was the promoter, owner, and lessor of the airport, took an air easement over the petitioner's property, for which it must pay just compensation as required by the Fourteenth Amendment.

It is unlikely that the Supreme Court will extend *Causby* to permit recovery for lateral noise interference, i.e., for damages resulting from sound and shock waves created by flights near but not directly over the complainant's property.* In this situation, there is no taking of his property for public use. He is not subjected to Mr. Causby's problems of inability to erect tall buildings, of glaring lights sweeping the property, and of the ever-present risk of airplane crashes. Even if a taking were established, compensation for lateral noise interference would pose two problems: 1) determining the point at which the taking ends and 2) the possibility that compensation for such taking will make the activity prohibitively expensive.

E. PENDING FEDERAL LEGISLATION (H.R. 11021: THE NOISE CONTROL ACT OF 1972)

At this writing, several pieces of noise abatement legislation are pending in both houses of Congress. The most important of these is H.R. 11021, the Noise Control Act of 1972, which was introduced by Rep. Rogers and 7 other members of the House and which was passed by the House on 29 Feb. 1972 (356-32).¹⁰ In general this bill prohibits a manufacturer (such as a government contractor) from distributing into commerce *new* products (i.e., those products whose title has never been transferred to an ultimate purchaser) which fail to meet noise emission regulations promulgated by EPA. As such this Act does not affect the occupational noise standards which are examined in part C of this section. States and municipalities are preempted only from setting stricter standards for new products. Hence stricter standards may be set 1) for products for which EPA has not set standards or 2) for the use of products for which EPA has set standards.

1. Noise Emission Standards for Products Distributed in Commerce (Sec. 6)

Section 6(a)(1) provides: "The Administrator shall publish proposed regulations, meeting the requirements of subsection (c) [examined below], for each product —

- (A) which is identified (or is part of a class identified) in any report published under section 5(b)(1) as a major source of noise
- (B) for which, in his judgment, noise emission standards are feasible, and
- (C) which falls in one of the following categories:
 - (i) Construction equipment
 - (ii) Transportation equipment (including recreational vehicles and related equipment)
 - (iii) Any motor or engine (including any equipment of which an engine or motor is an integral part)
 - (iv) Electrical or electronic equipment."

*The Supreme Court has not explicitly ruled on lateral aircraft noise damage, although treatment of an analogous situation respecting railroad noise and smoke is found in *Richards v. Washington Terminal*, 233 U.S. 546 (1914). However, the lower courts have treated this problem. The decisions are conflicting. See *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), which centered on U.S. Air Force flights and *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962). See also *Aaron v. City of Los Angeles* (Cal. Sup. Ct. 5 Feb. 1970), 3 ERC 1779, where compensation for lateral taking was permitted.

As stated in section 3(3) of the bill, "the term 'product' . . . does not include (A) any aircraft, aircraft engine, propeller, or appliance,* or (B)(i) any military weapons or equipment which are designated for combat use . . . or (iii) to the extent provided by regulations of the Administrator, any other machinery or equipment designated for use in experimental work done by or for the Federal Government."

While the Administrator's noise regulations must "include a noise emission standard which shall set limits on noise emissions" and must be "requisite to protect the public health or welfare," the Administrator must also "give appropriate consideration to technological feasibility and economic costs, and to standards under other laws designed to safeguard the health and welfare of persons."¹¹

Section 6(d)(1) clearly preempts any state or municipality from setting noise emission standards for new products which are stricter than those promulgated by the Administrator. The specific language of this section is as follows:

Subject to paragraph (2), no State or political subdivision thereof may adopt or enforce

- (A) with respect to any new product for which a regulation has been prescribed by the Administrator under this section, any law or regulation which sets a limit on noise emissions from such new product and which is not identical to such regulation of the Administrator; or
- (B) with respect to any component incorporated into such new product by the manufacturer of such product, any law or regulation setting a limit on noise emissions from such component when so incorporated.

Section 6(d)(2) illustrates that the scope of preemption is extremely limited. Stricter standards for products for which EPA has set standards can be achieved by any means other than by stricter manufacturing standards, such as by restricting the use of such products by the purchaser. Furthermore, stricter standards may be set for any products for which EPA has not set standards. Section 6(d)(2) states:

Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to control, regulate, or restrict the use, operation, or movement of any product.

Section 6 further requires the Administrator to propose noise regulations for products meeting the criteria of Section 6(c)(1) within 18 months of the date of enactment of the Act and to prescribe [promulgate] final regulations within 24 months of the date of enactment of the Act.

2. Enforcement (Sec. 11 and Sec. 12)

Section 11 authorizes the Administrator to ask the Justice Department to bring suit against any person who distributes in commerce any product which does not meet applicable noise

*Standards for these sources of noise are authorized in Sec. 611 of the Federal Aviation Act of 1958. Subsection V(A) of this paper illustrates that Sec. 611 would probably not pose any threat to military aircraft operations. Sec. 7 of this bill would amend Sec. 611 but the amendment as presently drafted will have no impact upon military aircraft operations.

regulations. However, such suits are at the complete discretion of the Justice Department, which may not be willing or fully staffed enough to bring suit against manufacturers of products which are essential to Naval operations.*

However, the barriers of favoritism to the Navy and/or lack of manpower are overcome by section 12, which states: "any person (other than the United States) may commence a civil action on his own behalf - 1) against any person (including (A) the United States . . .) who is alleged to be in violation of any noise control requirement (as defined in subsection (1))." That is, *any citizen can sue any person (such as a Government contractor) who manufactures products which do not meet noise regulations prescribed under section 6. A citizen could request the court to issue an injunction against distribution of such products in commerce.* Since such distribution is expressly prohibited by section 10(a), an injunction might well be granted.

If H.R. 11021 becomes law its impact upon Naval operations will depend upon the products for which the Administrator prescribes noise regulations and the extent to which the Navy's affected contractors comply with the Act. Granted if one contractor violates an applicable regulation and is faced with court injunction against product distribution, the Navy could (unless the products were unique) probably rescind the contract and look elsewhere for the product. To avoid rescission and new negotiations, or worse problems where there is no alternative source of product, the Navy might be well advised (perhaps by adding a clause to the contract and by making occasional inquiries) to ensure that its contractors are meeting applicable noise regulations.

F. THE PRESIDENT'S ATTITUDE TOWARD NOISE ABATEMENT

President Nixon's environmental messages to Congress suggest that the increasing Congressional concern with noise pollution, as manifested in the acts and bills examined above, is thoroughly consistent with the Administration's policy. For instance, the President's 1971 environmental message states in part: "The American people have rightly become increasingly annoyed by the growing level of noise that assails them. . . . The Federal Government has set and enforces standards for noise from aircraft, but it is now time that our efforts to deal with many other sources of noise be strengthened and expanded."¹²

*Also, see preceding description of the limited scope of the term product vis-a-vis military operations. The Justice Department could further justify a favorable attitude toward military contractors by quoting Sec. 11(d), which prohibits EPA and the Justice Department from enforcing the Act against "a department, agency, or instrumentality of the United States." That is, it could argue that a suit against a prime military contractor is in essence a suit against the Department of Defense, which is prohibited as noted above.

NOTES

1. 49 U.S.C.A. 1431 (Title VI, Sec. 611 of the Federal Aviation Act of 1958).
2. 42 U.S.C. 1857; Sec. 402.
3. 41 U.S.C. 35.
4. P.L. 91-596.
5. H.R. 91, 618, 1398, 3400 and 5461, 90th Congress: bills which concern aircraft noise abatement, from which came the ANAA.
6. House Report No. 1463, 23 May 1968, p. 20.
7. 34 F.R. 7946, 7949 (20 May 1969), as amended at 35 F.R. 1015 (24 Jan. 1970).
8. Executive Order 11612, Sec. 1, 36 F.R. 13891 (28 Jul. 1971).
9. George A. Spater, "Noise and the Law," 63 Mich. L. Rev.: 1373, 1394-1395 (1965), paraphrase. This paragraph derived from Mr. Spater's article.
10. H.R. 11021 and accompanying House debate is set forth in the Congressional Record of 29 Feb. 1972, pp. H1508-H1539.
11. Sec. 6(c)(1).
12. Nixon, President Richard M., op. cit., pp. H508-509.

VI. CONCLUSION

The following is a list of this paper's most important findings:

(1) An environmental impact statement must be issued for *any* Navy action which significantly affects the quality of the human environment, unless there is a clear conflict with other statutory authority. To require an impact statement only for *major* Navy actions significantly affecting the environment could result in a situation where a proposal to discharge a small amount of an inexpensive but highly toxic substance is not accompanied by an impact statement because the action is not considered major. Such a result surely was not intended by NEPA.

(2) It appears that a court will not issue an injunction against a Navy action which fails to comply with NEPA where such action is inextricably intertwined with national security, but may issue an injunction where such action is only marginally related to national security.

(3) If Naval incinerators and fossil-fuel steam-generators constructed or modified after 17 Aug. 1971 violate federal emission standards, any citizen may take the Navy to court; citizens may also enforce any other standard promulgated under the Clean Air Act of 1970, such as the soon to be published standards for aircraft and for sources of asbestos, mercury and beryllium.

(4) Many federally-approved state air pollution plans require permit application and source emission-limitations (some by June of 1972) and thus will affect those Naval facilities which contribute to air pollution.

(5) If the case of *Kalur v. Resor* is upheld on appeal it is probable that an aggrieved citizen will have standing to seek an injunction against a Naval discharge of pollutants for which a permit has been sought under the Refuse Act but for which an environmental impact statement has not been filed in compliance with NEPA. (See also 6(c) below concerning citizen enforcement of the permit program.)

(6) Four aspects of each of two bills to amend the Federal Water Pollution Control Act of 1970 (FWPCA) are of particular interest to the Navy (the bills have passed the House and Senate and are presently in conference).

(a) Each of the bills (by requiring the Navy to comply with "Federal, State, interstate, and local requirements" instead of with "applicable water quality standards") contains a more explicit statement of Congressional intent to waive the Navy's Constitutional immunity from state and local regulation.

(b) Each bill would provide for citizen enforcement of water pollution standards issued under the FWPCA.

(c) Each bill would make the Refuse Act permit program part of the FWPCA. The Senate bill would have EPA issue the permits while the House bill would have the states issue the permits. It appears that only the Senate permit program would be enforceable by citizen suit. The House permit program would require the Navy to comply with permit programs which may vary substantially among the States.

(d) Each bill would require Navy pretreatment of any pollutants which "would interfere" with municipal treatment systems. It is possible for EPA to decide that Navy sewage contains such oily wastes or is of such volume that it "would interfere" with municipal systems and would thus require pretreatment. The effects of pretreatment on the Navy's recently initiated system of shipboard sewage collection, holding and transfer to shore (CHT) might be considered. (See also (7) below concerning the cost of CHT system).

(7) The total daily sewage discharge from all Navy ships in U.S. ports is approximately equal to the daily discharge from the Georgetown sewer gap into the Potomac River. The costs of abatement, however, are significantly different: \$2.3 million for the Georgetown gap versus \$750 million for the Navy. To achieve the most abatement for our pollution control dollar, it would seem best to clean up the many "Georgetown gaps" across the nation before turning to the vastly more expensive problems of the Navy.

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Recent actions taken against the Navy arising from environmental concerns are cited. These actions are based upon the National Environmental Policy Act of 1969, the Clean Air Act of 1970, and the Federal Water Pollution Control Act of 1970. The influence upon naval operations of environmental legislation is analyzed.

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